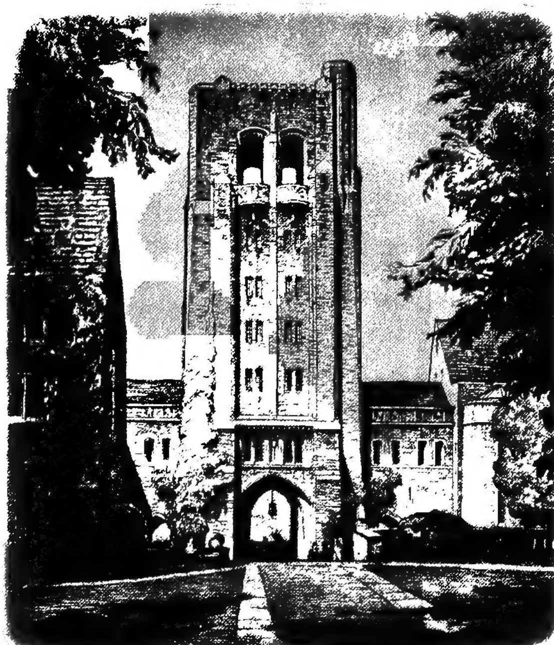

A TREATISE

ON THE

LAW OF PRIVATE CORPORATIONS,

DIVIDED WITH RESPECT TO

RIGHTS

PERTAINING TO THE CORPORATE ENTITY AS WELL AS THOSE OF THE CORPORATE INTERESTS OF MEMBERS,

REMEDIES

FOR THE ENFORCEMENT AND PROTECTION OF THESE RIGHTS AND INTERESTS,

AND

LEGISLATION

AMENDING AND REPEALING CHARTERS, REGULATING RATES AND CONDUCT OF BUSINESS, AND TAXING STOCK FRANCHISES, AND OTHER CORPORATE PROPERTY.

CONTAINING

A FULL AND COMPLETE EXPOSITION OF PRINCIPLES BOTH ANCIENT AND RECENTLY DEVELOPED, WITH REFERENCES TO AUTHORITIES IN ENGLAND AND ALL THE STATES DOWN TO DATE OF PUBLICATION.

BY T. CARL SPELLING,

OF THE SAN FRANCISCO BAR.

VOL. I.

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TO

HON. STEPHEN M. WHITE

OF CALIFORNIA,

Who, whether in official or professional life, or as a champion of popular sovereignty, has ever proven himself faithful to every trust, loyal and courageous in advocacy of public justice and in defense of private right, and in all qualities unexcelled as a type of intellectual American manhood, this work is respectfully dedicated by

THE AUTHOR.

PREFACE.

The author cannot justify this effort on the ground that there is a dearth of text books on the law of private corporations. Morawetz, for his clearness and comprehensiveness of style and statement, and Cook, for fullness of elaboration, well deserve special mention. And yet, it is safe to premise that a meritorious treatise on the subject, in faithful harmony with contemporary as well as early expositions by the courts, will find a welcome reception to the library of many lawyers making pretensions to success and efficiency in the profession. The tendency of the day is toward corporate aggregations of capital and effort. The liberal policy of state governments, allowing the formation of corporations under general laws for an almost unlimited number of objects, facilitates and aids this tendency. A large and constantly increasing proportion of the business of the country has come to be transacted by these artificial agencies. It is a logical sequence and matter of common observation, that the number of controversies involving this branch of the law and requiring settlement by the courts is increasing and will continue to increase. The development of resources has but fairly begun, and the field in which corporations may operate and employ their capital to advantage is virtually unlimited. Moreover, the law of corporations may be said to be in its infancy—at any rate, in its early stages; so that a presentation of the law as expounded and adjudged a few years ago is inadequate and unsatisfactory to the busy practitioner.

Attention is called to the original and logical division of the subject as illustrated in the analytical plan, (pages one and two). It is no unfair criticism of previous divisions to say that they have been awkward and illogical. The actions of members for an accounting by officers, against each other, and against promoters; of creditors against the corporation, against corporate assets in the hands of receivers, and against members for unpaid capital, and upon the statutory personal liability of members and

officers; of members and creditors by writ of *mandamus;* the remedies of the state by *quo warranto*, and the *ex parte* proceedings of the corporation upon insolvency and voluntary dissolution, have previously as a rule been treated respectively in disjointed and isolated chapters, when they should have been classed as remedies and subdivided according to their relations to the whole subject into remedies internal and external. Amendment and repeal of charters, and the exercise of taxing and police powers by the state not being capable of classification either as corporate rights or remedies are treated in three final chapters constituting Part Three. In the present arrangement of the matter exactness of division heading as indicating the contents is sufficiently clear, while the fullness of the indexing is relied upon to supply any deficiencies that may be discovered in that respect.

The author has not taken the trouble to count the number of cases cited, nor does he think there is any special merit in a claim of any writer of text books that he has cited more cases than any or all others. He considers that the citation of one or two of the latest decisions in a state wherein former decisions in the same state are cited and reviewed will yield space which can be better devoted to development of principles than to a long string of cases which will necessarily come to the notice of the practitioner upon examination of the latest decisions. This plan of the work has been departed from where conflict of decisions in the same state, or generally, rendered it advisable. Any one choosing to do so, either for the sake of comparison or to gratify curiosity, may count the cases for himself. It is thought that more are cited than in any previous work on this branch of the law, and that few of any importance have been overlooked.

No words will be wasted in relating how much labor and what degree of patience were involved. These are matters with which courts and lawyers cannot be expected to become interested. The result must tell its own story. Previous experience and researches incident to a somewhat extensive practice, principally in this branch, have been of great assistance in discriminating and forming opinions in cases of conflicting authority. The same conscientious pains-taking and care have been devoted to the notes as to the text. An incongruous digest of cases might have swelled the size of the work but would have been

a positive hindrance to the lawyer or judge who looks in a text book for the gist of the law and a guide to authorities which he examines for himself. Great care has been taken that each authority cited supports the principle announced, though errors may occasionally be found. The indexing is thorough and exact, a matter of considerable importance in all cases. All attempts at elaboration of historical and obsolete matters have been avoided, and the greatest utility within the smallest compass has been the ruling motto throughout.

Under the circumstances it was deemed best to retain the references to periodical reporters, as these are coming into general use, side by side with official reports.

The words "the author thinks" are not found, nor is the editorial "we" used in the work.

The individual opinion of the writer is expressed freely wherever the law is unsettled, or the decisions conflicting, but not obtrusively or controversially.

It would be unjust, and deprive the author of a great pleasure, not to mention the uniform and undeviating courtesy and many kindnesses on the part of James H. Deering, Librarian of the San Francisco Law Library and the author of a valuable legal treatise, and of his assistants, J. Fred Tyler and David Lloyd Conkling, during a considerable portion of the time occupied in this work.

Whatever sacrifices the preparation of the following pages may have involved, they have been made cheerfully to the cause of a science which, though technical and somewhat speculative, yet is broader than any, and touches all sciences and all human affairs. If the result be accepted as a genuine contribution to legal literature the author will be fully compensated aside from any pecuniary returns. So many considerations enter into our conception of a good book that it is nearly as easy to write one as to tell what it should be. This effort is submitted to the profession with the understanding that it will be judged according to its merits and demerits. Reliance is placed no less upon the liberality than the intelligence of those to whom it is offered. To their judgment and charitable consideration it is respectfully submitted.

THOS. CARL SPELLING.

SAN FRANCISCO, Cal., Jan. 1892.

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ABBREVIATIONS OF PERIODICALS & REPORTERS.

A	Atlantic Reporter.
Alb. L. J	Albany Law Journal.
Am. L. Rev	American Law Review.
Cent. L. J	Central Law Journal.
F	Federal Reporter.
L. R. An	Lawyer's Reporter, Annotated.
N. E	Northeastern Reporter.
N. or N. W	Northwestern Reporter.
N. Y. S	New York Supplement.
N. Y. St. R	New York State Reporter.
P	Pacific Reporter.
Ry. & Corp. L. J	Railway and Corporation Law Journal.
S. Ct	Supreme Court Reporter.
S. E	Southeastern Reporter.
S. W	Southwestern Reporter.
So	Southern Reporter.
W. N. C	Weekly New Cases.

PRIVATE CORPORATIONS AS TREATED HEREIN.

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PART I.

RIGHTS.

CHAPTER I.

THE CORPORATE EXISTENCE.

§ 1. Definition.
2. Common law incidents.
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§ 1. **Definition.**—A corporation has been defined by writers and judges in varied phraseology and degrees of accuracy. All agree that it is purely a creation of law with certain rights in common with individuals and others that are distinctive, all of which must be held and exercised for the objects for which it is created.[1]

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[1] See Southern Pacific R. R. Co. v. Orton, 32 Fed. R. 457. One of the clearest and most comprehensive among definitions taking cognizance of the individuals composing as well as of the entity by which they are represented in the corporation, and of the rights and powers of both, is that of Chief Justice Marshall, as follows: "An artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created, and among the most important are immortality, and if the expression may be allowed, individuality—properties by which a perpetual succession of many persons are considered as

While it is manifest that a corporation cannot exist for any practical purpose without members, yet in strict legal contemplation, as has been often adjudicated and explained, the legal entity is something distinct and separate from those who employ it as an agency to accomplish their objects, whether these be public or private. And it is equally difficult to discover any reason for incumbering the definition with a consideration of the corporation's term of existence. There is nothing definitive in the idea of immortality, and besides, under modern laws, the term of corporate existence is usually limited like a lease of real estate, to a number of years. Even when such is not the case, the length of a corporation's life always depends to a great extent upon the will or disposition of its members to keep it alive. It is also liable like natural persons to accidents, and may at any time, as we shall see hereafter, have its term of existence cut short at the hands of the state on account of the malfeasance or nonfeasance of its management.

A full and complete definition of a corporation can only be given by telling what are its rights, powers, duties, and relations, and the legal and equitable principles which control it in all its parts and functions and how they operate. That is the object of this treatise.

§ 2. **Common Law Incidents.**—There are certain rights and components necessarily implied in our conception

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the same, and may act as a single individual." Dartmouth College v. Woodward, 4 Wheat. 636. It would be difficult to improve upon the following definition by Prof. Minor, "A body composed of one or more individuals and possessed of a franchise by virtue of which it subsists as a body politic under a special designation and by the policy of the law is vested with the capacity of perpetual succession, and of acting in several particulars however numerous the association, as a single individual." 1 Minor Inst. 541. "Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common seal, and to change members without a dissolution of the association." Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317.

of a corporation as an artificial legal entity and in the employment through it of capital or effort, or both, by its incorporators and members in carrying out the design of its creation. It is difficult to conceive of a corporation existing for any practical purpose without: 1. Continuous succession by a corporate name during the period specified in the act of incorporation.[1] 2. The

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[1] Ang. & Ames on Corp. 99. If a name be not given in the charter one may be assumed, 1 Salk. 191, or acquired by usage, Smith v. Plank Road Co., 30 Ala. 650. The name should be distinct from that of any other body incorporated in the same state. Newby v. Or. Cent. R. Co., Deady, (U. S. C. C.) 609; Presby Ch. etc. 2 Grant's Cas. (Pa.) 240. A corporation held not entitled to incorporate as "The Kansas City Real Estate Exchange" when there was in the same city another corporation carrying on the same business under the style of the "Kansas City Real Estate and Stock Exchange." State v. McGrath, 92 Mo. 355; 5 S. W. 29. See also Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas, 21 Abb. N. C. 104; 1 N. Y. S. 44; In re United States Mercantile Reporting Co., 115 N. Y. 176; 21 N. E. 1034; as to power of Court to change the name, Nebraska Loan & Trust Co. v. Nine, 27 Neb. 507; 43. N.W. 348, holding that it is no infringement to take the name of the state adopted by another company 100 miles distant, unless conflict of interest is shown. See also In re Bank of Attica, 12 N. Y. S. 648. Substantially same ruling with respect to use of name of trade in which two companies were engaged, Boston etc. Shoe Co. v. Boston Rubber, Co. 149 Mass. 436. See also Employers' Assur. Corp. v. Employers' Liability Ins. Co., 10 N. Y. S. 845, where the court refused to enjoin a foreign corporation at suit of another foreign corporation. But a corporation may take the name of a corporation of another state. Lehigh Val. Coal Co. v. Hampden, (Pa.) 8 Am. & Eng. Corp. Cas. 201; Reese v. Newport News & M. v. Co., 32 W. Va. 164; 9 S. E. 212. But in such case a domestic corporation of the same name is entitled to an injunction restraining the foreign corporation from doing business in the same state with the former. International Trust Co. v. International Loan & Trust Co., (Mass.) 26 N. E. 693. It has been said that a corporation may be empowered by charter to act and purchase and receive conveyances in one name, and to sue and be sued in another, and may be specially empowered to use more than one name for the same purpose. Ang. & Ames, 100; 1 Kyd. 229, 230; 3 Salk. 102. See Minot v. Curtis, 7 Mass. 441. But where a certain name has been given in the charter, and adopted, that name and no other must be used in substance. Glass v. Tipton, etc. Co., 32 Ind. 376, though a slight variance between the words and syllables of the two names will not render the act or conveyance invalid. Rex v. Haughley, 1 Bam. & Ald. 655. And if a corporation convey by a wrong name, it cannot take advantage of the misnomer after receiving the consideration. African Soc. v. Varick, 13 Johns. (N. Y.) 38. It has been held sufficient to sustain a devise to a corporation if it was shown that it was meant, though there was a mistake in the name. Vansant v. Roberts, 3 Md. 119; First Parish v. Cole, 3 Pick, (Mass.) 232. Corporations are entitled to protection in the use of their corporate names to the same extent as individuals in the use of trade marks. Merchants' Detective Assn. v. Detective Mercantile Agency, 25 Ill. app. 250. As to what constitutes infringement

right to purchase, hold and convey lands and personal property[1] and contract obligations.[2] 3. To sue and be sued.[3] 4. To have and use a common seal.[4] 5. To make rules and regulations called by-laws for the government of the body corporate and its business. 6. To appoint and remove officers and expel members for sufficient cause.[6]

The foregoing may be called ordinary rights or common law incidents since they have always been recognized as essential incidents and components of corporate existence.

§ 3. **Principles applicable alike to corporations and individuals.**—In the exercise of these and such additional powers as are given in the charter, either expressly or by implication, the same principles are uniformly applied as to individuals.[7] The charter of a corporation fulfills exactly the office, to the extent of its powers, as a power of attorney given to an individual.

All ancient theories of functions peculiar to themselves in the matter of contracting, with respect to their liability for torts and all technical distinctions in regard to sealing and formalities in the execution of instruments between corporations and individuals, have dis-

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entitling complainant to injunction, see U.S. Mer. Rep. Co. v. U. S. Mer. Rep. Assn., 21 Abb. N. C. (N. Y.) 115; American Order of Scottish Clans v. Merrill, 151 Mass. 558; 24 N. E. 918; holding also that under Mass. Stat. 1888, C. 429, certificate of Secretary of Commonwealth and Insurance Commissioner are conclusive as to the right to use name; In re N. Fifth St. Mut. Land Ass'n, 8 Pa. Co. Ct. Rep. 15. Corporate name can be changed only in manner pointed out by law Sykes v. People (Ill.) 23 N. E. 391; but an attempt to change name otherwise does not avoid charter, O'Donnell v. C. R. Johns & Co., 76 Tex. 36; 13 S. W. 376. See King v. Illwaco Ry. & Nav. Co. (Wash.) 23 P. 924, as to changing by amendment of articles. The fact that a corporation has changed its name without any change in its membership was held no defense to an action instituted against it under its former name Welfley v. Shenandoah I. L. M. & M. Co., 83 Va. 768. 3 S. E. 376; Appearance without objection is a waiver of misnomer. Bate v. Gillett, 31 F. 809.

[1] Infra, ch. x. [2] Infra, ch. viii. [3] Infra, ch. xxi. [4] Infra, § 195. [5] Infra, ch. xvi. [6] Infra, ch. xx. [7] Infra, § 61.

appeared in modern times. By the whole course of decisions in this country and also in England the transactions of corporations and individuals are to a great extent assimilated.[1]

It is only in internal affairs, in the rights and equities between the members and the corporate entity and among themselves, in the disabilities with respect to citizenship and their relations to the state, that marked and peculiar differences exist between the law as administered to corporations and individuals. A consideration and exposition of these is the proper province of a work of this character. Corporations are also subject to the usual burdens and duties of inhabitancy and have their domicile, owe allegiance, and are subject to local jurisdiction like moral beings.

§ 4. **Continuity of existence.**—A distinguishing feature of a corporation not possessed by natural persons is its continuity of existence as the same artificial person by means of perpetual succession in its membership. Like the attribute of individuality this power to perpetuate itself belongs to a corporation from necessity. Without the one there would be no single will or responsible source of authority, and without the other the rights and privileges of the corporation would determine or vary upon the death or change of any of the individual members.

But when it is said that corporations have perpetual succession, it is meant that they have continuity only during any limited period of time which may be fixed

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[1] In Barwick v. London J. S. Bank, L. R. 2 Exch. 259, a case of fraud by agent, Lord Ch. Cranworth said: "If the agents employed conduct themselves fraudulently so that if they were acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." See also to same effect, Mackay v. Com. Bank, etc., L. R. 5 Priv. Co. 394. This subject fully considered, infra.

by the law of their creation; and it is to be understood in the sense that such existence may be terminated at any time either by their failure to avail themselves of the privileges afforded by law or by some act which authorizes and causes the State to terminate it.

In the proper and more restricted sense the immortality of a corporation means only its capacity to take in perpetual succession so long as it exists.

§ 5. **Members necessary.**—Though as has just been stated the membership is distinct from the corporation in whose name they act and which abides in legal contemplation only, yet without members, it is for all practical purposes lifeless. These are usually natural persons but may consist of persons in a political capacity as the governor of a State or the officers and citizens of a municipality. A corporation may also have for its members other corporations as in the cases of the Universities of Oxford and Cambridge of which several incorporated colleges within these universities are the members.[1]

But a corporation cannot become a member in another capital stock corporation without express statutory authority.[2] It is not usually among the implied powers of corporations formed under general laws

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[1] Regents, etc. v. Williams, 9 G. & J. (Md.) 365; Am. Refrig. & Constr. Co. v. Linn. (Ala.) 7 So. 191; Kohl v. Lillienthal, 81 Cal. 378; 20 P. 401; 22 P. 689, where two mining corporations formed a third and became its principal shareholders. Corporations are in some states prohibited from becoming stockholders in others engaged in the same line of business. See Const. Ga. Art. 4, Sec. 2, Part 4. The policy of such prohibition is to prevent the destruction of competition and the creation of monopoly. Branch v. Langdon, 37 Fed. R. 449. It has been held that statutory authority was necessary. Valley Ry. Co. v. L. E. Iron Co., 46 Ohio St. 44; 18 N. E. 486. See also Cent. R. Co. v. Penn. R. Co., 31 N. J. Eq. 475; Franklin Co v. Lewiston Sav. Bank, 68 Me. 43; Contral Co. v. Collins, 40 Ga. 582.

[2] Infra, § 28.

to subscribe for shares in either a new or an existing company.[1]

§ 6. Two corporations may have membership in common.—The same person is often found holding memberships in different corporations and the identical body of persons constituting one corporation may constitute the sole membership of one or several more. The President and directors of one bank may be members and president and directors of another bank or the incorporated managers of any other incorporated institution.[2] A state may create a corporation to be composed of several corporations chartered by different States in the same way that it would confer corporate powers upon natural persons.[3]

§ 7. Individuality and unity of corporate entity.—Persons incorporated cannot carry out any of the objects of the corporation or do a single corporate act otherwise than in its name and by virtue of its authority; nor can they litigate their rights growing out of their individual interests in corporate property except in their corporate name.[4] Its franchises and property

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1 Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44; 26 Am. & Eng. Cor. Cas. 55; Cent. R. Co. v. Penn. R. Co., 31 N. J. Eq. 475; Franklyn Co. v. Lewiston Sav. Bank, 68 Me. 43; Centr. R. Co. v. Collins, 40 Ga. 582; M. & C. R. Co. v. Woods, ; 88 Ala. 630. 7 So 108.

2 Atty. Gen. v. Brazen, etc., College. 8 Bligh, N. S. 377; Rex v. Colchester, cited 3 Term. Rep. 234. The same person may fill the office of president of two distinct corporations, and such identity does not of itself invalidate dealings between the two corporations, Leathers v. Janney, 41 La. Ann.1120; 6 So. 884. So where the same persons were members of three corporations and caused their corporate interests in them all to become identified by the equalization of their shares in a suit at common law, it was held that the three companies might be regarded as distinct legal persons. Proprs. Canal Bridge v. Gordon, 1 Pick. 297. The doctrine that the same natural person may hold membership in several corporations was contained in the civil law. Ayliffe 5 Civ. L. 204. And it is well settled in England and all the States of the Union where the question has been raised.

3 Bishop v. Brainerd, 28 Conn. 289. See Hunt v. Kansas Bridge Co., 11 Kans. 412.

4 Whitehouse v. Sprague (Me.) 7 A. 17; Harkness v. Manhattan R. Co., 54 N. Y. Supr. Ct. 174.

are vested in it and not in the members, and the latter cannot *in propria personæ* affect its title or divest it of its property though their act be concurred in unanimously.[1] Its personality is so distinct from that of those composing it at law that the latter cannot join in a binding contract with it or receive the benefits of a contract that has been made with it. Whatever causes of action accrue to others whether members or not arising out of transactions on corporate account they must be brought against the corporation and not against its members or officers. However, if the directors or other agents commit willful torts in the corporate name they are individually liable.[2]

§ 8. **Of the twofold relation.**—Every private corporation sustains two relations; the one to the members who in its name combine their capital or efforts, or both to effect an object beneficial to themselves or to others; the other to the sovereignty by the exercise of whose will or by whose consent it came into being. The theory that each corporation represents a particle of sovereignty granted by the State from motives of public utility though practically obsolete and little more than a fiction at the present day, when applied to corporations that are strictly private, yet is convenient in understanding the real nature and function of the legal entity.

Adhering to this theory and keeping in view its relation to the members as their representatives there is little if any difference, technically speaking, between a corporation and a public office instituted to subserve public interests and enjoyed for a time definite or indefinite by the incumbent. If the office be lucrative his interest corresponds to that of the members of a

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[1] Infra, § 548. [2] Infra, § 939.

corporation organized and managed for profit; if it be an office of honor only, the incumbent holds a similar relation to it as do the members of a benevolent corporation to the latter. It may be that the public interest in a public office is greater than in any except public or *quasi* public corporations and greatly preponderates as regards the community, over the private interest of the incumbent, and the public interest in a private corporation may be very small in comparison with that of the incorporators, but these facts do not destroy or disturb the analogy between the legal attributes of the two agencies.

§ 9. **Corporations and partnerships distinguished.**—It is sometimes difficult to determine whether a particular company or association of persons is a corporation or a copartnership. The same institution cannot be both, nor can its members change their relation in this respect at pleasure. They possess the following points of resemblance: 1. Each may comprise numerous members associated together in one enterprise; 2.—The membership may consist not only of natural persons but of corporations or partnerships;[1] 3.—In each there may be a joint stock divided under by-laws or articles of agreement into shares transferable by assignment or delivery; 4.—Each may hold its property and transact its business, sue and be sued under and by a common name; 5.—Partners like incorporators are frequently allowed by statute to limit their liability to the extent of stock or interest held by them. There are the following points of difference: 1. Each partner is an agent for the partnership and may bind it to any extent

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[1] The weight of authority at present is against the right of a corporation to become a member of a copartnership. Infra, § 971. Still it may bind itself by its dealings and contracts as a member of a copartnership unless the state objects. No such objection lies against a co-partnership being a stockholder in a corporation.

within the scope of the partnership business, while corporators possess no power as such to bind the corporation ; 2.—Each partner is personally liable for the liabilities of the firm while shareholders in a corporation are not liable for its debts except where made so by statute.

At common law the personal responsibility of stockholders is inconsistent with existence of a body corporate.[1]

§ 10. **Name furnishes no test.**—It is wholly immaterial what name an association assumes whether one indicating corporate or copartnership capacity or of a joint stock company. If it is organized under and avails itself of the provisions of a public act in its formation and exercises the functions and privileges and enjoys the immunities of corporations under the law it will be deemed and treated as a corporation, whether in its articles any act or statute be referred to or not.[2]

§ 11. **Class to which corporation belongs to be considered.**—As regards the implied conditions and incidents of corporate existence regard must be had to the class to which the particular corporation belongs. It is deemed unnecessary to enter into elaborate classifications of corporations, ancient and modern.[3] Such a task

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[1] For a fuller discussion of the difference between corporations and partnerships see Walker's Am. Law 223.

[2] People v. Wemple (N. Y.) 6 L. R. An. 303; Conservator v. Ash., 10 Bam. & C. 349; Denton v. Jackson, 2 Johns. Ch. 320; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Watersbury v. Mer. W. Expr. Co., 50 Barb. 157; Fargo v. McVickar, 55 Barb. 440; Fargo v. L. N. A. & C. R. Co., 6 Fed. Rep. 787. Most of these cases also recognize the doctrine that when the state grants to individuals such property rights or franchises or imposes upon them such burdens as can only be properly held enjoyed or borne according to the terms of the grant by a corporation, the intention to create such corporate entity is presumed.

[3] The earliest corporations of which history gives any account were of a municipal kind and were created purely from political motives and for the accomplishment of objects of public concern. There is no doubt but that important functions of government were conferred upon towns and cities by the

would involve historical discussion which if full and critical would occupy too much space, and if partial and cursory would be of little value. But it is well to note that the early division of lay corporations into eleemosynary and civil is still of considerable importance, owing to the fact that there are different statutory enactments governing them in most of the states, and to the further fact that judges of our courts, as in former times, in determining the respective rights of the two classes, apply to them different principles and rules of construction. Civil corporations comprise all which have for their object pecuniary profit, and all are municipal and other public corporations which perform any of the functions of government. Those created by statutes and city ordinances for the relief of the distressed indigent and helpless members of society, such as hospitals, insane asylums, and homes for feeble-minded children are civil and not eleemosynary.[1]

Greeks from whom the idea was derived and the practice adopted by the Romans. At any rate some of the most important conceptions of corporations owe their origin to the Roman civil law. Private trading corporations are of almost as ancient origin as municipal, but they were at all times under the ban of disfavor with the ruling powers of Greece and Rome and to some extent among the people of modern nations. An evidence of this is found in the abolition of all trading companies by one imperial decree of Augustus. The classifications of the early English Judges and law writers though still retained in our law books, were based on a state of political and religious affairs which have no existence in this country. Though most of the definitions of that period will apply to institutions found among us at the present day, yet this branch of the law is greatly simplified by limiting the primary classification of corporations to the heads public and private here given. There were at the period mentioned, the general division into ecclesiastical and lay; the first term including all religious corporations and the latter all other kinds. Ecclesiastical corporations were before the Reformation subdivided into regular and secular. Regular corporations were composed of ecclesiastical persons who lived under some rule and had a common dormitory and refectory and were obliged to observe the statutes of their order; while secular were so called because they performed spiritual offices and took upon themselves the care of souls.

[1] 1 Blk. Com. 471; 1 Kyd on Corp. 27. The reason for so classifying them is that in providing for them the body politic does not administer a private charity but performs a duty to the unfortunate among the members constituting it.

Eleemosynary corporations comprise all having for their objects the prosecution of purely charitable objects and the promulgation of religious and humane doctrines when personal gain forms no part. This definition embraces all colleges and other educational institutions founded by private gifts and bequests in aid of those who have not the means for otherwise pursuing their studies.[1] Though the government be the principal promoter and supporter of a corporation having for its object the gratuitous distribution of alms or free education of persons, yet unless it conducts and controls it as a part of the governmental autonomy, the institution is not a public but a private eleemosynary corporation.[2] The object to be accomplished by public corporations are strictly public ; by private corporations strictly private. Public corporations assume some of the duties of the state in a subordinate relation to the state and within circumscribed boundaries fixed by it. Private corporations, are such as have no public interest to subserve except in a vague sense, and their principal object is the emolument of their members. There is a class of private corporations, sometimes called *quasi* public, having a concern with certain expensive undertakings which though highly beneficial to the public are undertaken from no sense of public duty but in consideration of valuable concessions and privileges conferred by the state and from the further motive of employing the franchises thus conferred in the prosecution of gainful private enterprises.[3]

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[1] Dartmouth College v. Woodward, 4 Wheat 681; 1 Blk. Com. 471; 1 Kyd on Corp. 25; Trustees of Phillips Academy v. King, 12 Mass. 546.

[2] It was so held in a case where an act of Congress reserved certain townships for the use of a seminary of learning and by subsequent acts incorporated it as the Vincennes University and provided that the trustees in their corporate capacity or a majority of them might sell and convey any portion of the land not exceeding four thousand acres for the use of the university and rent the remainder for the same use. Vincennes University v. Indiana, 14 How. 268.

[3] McKim v. Odom, 3 Bland Ch. 407. A public corporation has been de-

§ 12. **The range of objects not decisive.**—In determining whether the powers exercised are public or private, regard should be had not so much to the nature and character of the rights conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively they belong to the corporate body in its public and political character. But if the grant was for purposes of private advantage and emolument though the public may derive a common benefit therefrom the corporation *quoad hoc* is to be deemed private.

Corporations which exercise any delegated powers of government are public however restricted as to the number and extent of the exercise of such functions. In this sense school districts, road districts and the like are public corporations. Unless public objects are contemplated and designated in its creation the corporation is private though the government be the principal stockholder.

§ 13. **Private corporations performing public duties.**— Merely conferring power for the performance of duties of a public character does not make a corporation public even though such duties amount to police regulations. The Statute of Henry VIII, ch. 5, created the college of physicians in London and authorized them in their corporate capacity to impose a fine on persons practicing without its license and yet it was held to be a private corporation.[1] All corporations are founded upon the principle that by their creation

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fined to be one which cannot carry out the purposes of its organization without chartered rights from the commonwealth. Alleghany County v. McKeesport Diamond Market, 123 Pa. St. 164; 16 A. 619; and a private corporation as one needing no franchise from the state in order to carry on its business. Pittsburgh's Appeal, 123 Pa. St. 374; 16 A. 621.

[1] Regents of University of Md. v. Williams, 9 Gill. & Johns. 365.

the public interest or convenience will be promoted, and the mere fact that the public derives a benefit from it is not sufficient to determine its character as public or private.[1] This applies to all insurance, canal, bridge and turnpike companies.[2] The true criterion is whether the objects, uses, and purposes for which the corporation was organized were solely for public benefit and convenience or for private emolument, and whether the public can participate in them by right or only by permission.[3]

§ 14. Subdivision common to both.—Both public and private corporations are susceptible of subdivision into aggregate and sole, such subdivision relating to functional control and primary constitution. Corporations sole have their objects carried out by a single incumbent, while corporations aggregate are usually composed of more than one. Still, if in a capitalized corporation one person should become possessed of all the stock

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1 A corporation having for its objects the promotion of private interests of owners of real estate in a district and of others not included in its provisions was held to be a private corporation though its powers were co-extensive with the district. Directors v. Houston, 71 Ill. 318.

2 Tinsman v. Belvidere Del. R. R. Co., 2 Dutcher N. J. 148; State v. New Orleans Gas Light & Banking Co., 2 Rob. La. 529; Ten Eyck v. Del. & R. Can Co. 3 Har. (N. J.) 200.

3 Ala. etc. R. R. Co. v. Kidd, 29 Ala. 221; Sweat v. Boston, 3 Clifford, 339. The property of a railroad corporation is in the hands of individuals who exercise control and management for their own benefit, while the public derives a benefit and has an interest regulated and guarded by the state. The status of railroad and turnpike companies is well defined by Ruffin, C. J., in R. & G. R. R. R. Co. v. Davis, 2 Dev. & Batt. 451: "As to the corporation it is a franchise like a ferry or any other. As to the public it is a highway and in the strictest sense *publici juris*. The land needed for its construction is taken by the public for the public use and not merely for the private advantage of individuals. It is only vested in the company for the purposes of the act, that is to make the road." Water companies incorporated to supply cities or districts and gas companies are *quasi* public corporations whose primary objects are mainly private in the same sense with railroad companies. Society, etc., v. Butler, 12 N. J. Eq. 498. A valuable explanation of the distinction between a public and a private corporation may be found in the City of Louisville v. University of Louisville, 15 B. Mon. 642.

or in case of an incorporated non-capital association all the members except one should die or resign, the character of the corporate body would in neither case change from aggregate to sole, such not being the intent of the legislature at its creation. Nor in such cases is the corporation dissolved. By the death of nearly all its members the corporate enterprise may come to an end or become impossible of further prosecution, but the corporate entity still exists until dissolution in the manner provided by law.[1] Number is often made the test of classification as sole or aggregate; but such test seems arbitrary and misleading. Those corporations which at their creation imply an undivided individual responsibility are sole, and those which by the form and terms of their creation are designed to combine divers interests are aggregate.

Under the first head fall the office of Governor, that of parson, rector, etc., in churches in England and in this country where incorporated as such.

Municipalities, capital stock insurance, banking, manufacturing and railroad companies and all incorporated, mutual benefit and fraternal societies belong to the class of corporations aggregate.

§ **15. Public corporations sole distinguished from private.** —The incumbents of public corporations sole are trustees for the people and the interests they represent. In case of a minister of a parish who is seized of lands in its right as a corporation sole he holds them to himself and his successors in trust; and in case of a vacancy the parish is entitled to possession and may enter and take possession until there is a successor.[2]

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[1] Infra, § 1006.

[2] N. Hempstead v. Hempstead, 2 Wend. 135. Under the general banking law of New York of 1838 an individual banker was held not to be a corporation. Hallett v. Harrower, 33 Barb. 537; Codd v. Rathbone, 19 N. Y. 373; Bank of Havana v. Magee, 2 Id. 355.

And it is held that whenever any officer or other person is authorized to hold real and personal property to himself and his successors he thereby becomes a corporation sole.[1] Mr. Kyd, an excellent authority on the law of corporations in England, distinguishes very clearly between the two classes of corporations sole. Of the one class are those wherein the incumbent acts only as a trustee for the benefit of others, and of the other those where the incumbent has a corporate power for his own benefit. The Chamberlain of the City of London, he places in the class of public corporations sole, "who," says he "may take a recognizance to himself and his successors in his politic capacity in trust for the orphans."[2] Corporations sole, the incumbents of which hold particular offices with power to act in their public character as trustees for others involve the necessity of having perpetual succession and the power of suing and being sued in their public character as far as their trusts are concerned. A corporation aggregate may acquire and hold personal property for itself and its successors but a corporation sole cannot at common law.[3] They are empowered by

[1] Thomas v. Dakin, 22 Wend. 1, 102; Denton v. Jackson, 2 John (Ch.) 235.

[2] In England there are many authorized appropriations of particular revenues to corporations sole, which belong to the incumbent not in his natural but in his public capacity, and the right to them vests at death not in his heirs but in his successors in office. All such are private corporations, as they subserve no public interest except in a very limited sense.

[3] "A bishop or parson acting in a corporate capacity, and holding property to him and his successor in right of his office, has no need of a corporate name, he requires no peculiar seal, in his own name, and name of office ; his own will regulates his acts, and he has no occasion for a secretary, for he need not keep a record of his own acts; no need of a treasurer, for he has no personal property except the rents and proceeds of the corporate estate, and these he takes to his own use when received. By-laws are unnecessary, for he regulates his own action by his own will and judgment, like any other individual acting in his own right. Such a person holding an estate as a sole corporation dies or resigns his office; the fee is in abeyance until a successor is appointed. The incumbent holds the property to his own use and benefit whilst he retains the office, and afterward the estate and the enjoyment of it go together to his successor. The

statute however to take and transmit personalty to their successors. Few general principles apply alike to aggregate and sole corporations. There are but few private corporations sole to be found in the United States at the present day. Where they exist they have been created or provided for by statute.

§ **16. Existence of private corporations beneficial.**—Regardless of prejudices and popular demands for stringent statutory limitations and strict judicial construction the necessity for private corporations is almost universally admitted. Without them no rights could be continued beyond the lives of persons possessed of them. For such great works of internal improvement as require enormous investments in land, machinery and other property and in wages before yielding a revenue, railroads for instance, and such enterprises as from their nature could not be profitably prosecuted for short periods, such as the business of banking and insurance, they may be said to be indispensable.[1]

transmission of the estate is perpetual, but the beneficial enjoyment changes at each succession. On the other hand, a corporation aggregate has a perpetual existence without any change, so that an estate once vested in it continues vested without interruption. From this flows one necessary but obvious legal consequence, which is, that a grant to an aggregate corporation carries a fee without the word successors; while a grant to a corporation sole without including successors carries a life estate only to the actual incumbent who is the first taker." Overseers v. Sears, 22 Pick. 125.

[1] Many examples of Roman jealousy of private corporations might be given. The same prejudice existed until a comparatively recent date in England. There is still a deep seated jealousy cherished and cultivated among the people against certain phases and tendencies of private corporations. It never totally disappears, but on occasions with little or much provocation becomes a popular clamor. The basis of the present fear in regard to corporations is not as formerly, that they will exercise directly the functions of government, but that they will by unfair and corrupt means influence the instruments of government, and that their ability and opportunity to do so is furnished in the facilities the law of their creation gives them to absorb and aggregate wealth and with it operate on

the hopes, fears and necessities of both the people and those to whom they have for the time, entrusted legislative, judicial and executive duties. It must be admitted that the spirit of injustice and the disposition to prey upon wealthy corporations has sometimes characterized legislators to such an extent as to *almost* justify such corporations in going into politics in self-defense.

Notwithstanding numerous and widespread suspicions and warnings there is an undeviating trend of legislative enactment and judicial construction favorable to their numerical increase and the extension of corporate privileges and objects.

In justification of this policy, great reliance is placed upon the wisdom and virtue of the people and their representatives supposed to be sufficient to meet and dispose of any dangers which may arise from this source. Time alone can determine whether that confidence is being safely reposed or perilously misplaced. Like other great political and economic problems beset with difficulties, it will probably be solved and set at rest when our form of government and liberties become imperilled, if that time should ever come, and not before. In whatever there is opportunity for competition on equal terms, as in trading, insurance, banking and the like, there can be no valid objection to an unlimited number of corporations; but where the necessities of the public or geographical conformation have provided vantage points as in the business of transportation, furnishing light and water to cities and districts, and in certain manufactures the number which can operate within a given territory successfully is often restricted to one, and monopoly with the opportunity for oppression, extortion and accumulation of colossal wealth is a necessary consequence.

CHAPTER II.

ESSENTIALS OF ACT OF INCORPORATION.

§ 17. Authority to act as a corporation, how derived and evidenced.—No power less than the government of a state can create a body corporate and politic.[1] Though

[1] Franklin Bridge Co. v. Wood, 14 Ga. 80; United States Trust Co. v. Brady, 20 Barb. 119; Penn. R. R. Co. v. Canal Com'rs., 21 Pa. St. 9; McKim v. Odom,

it is essentially an act of sovereignty, yet by the common law and by its recognition and adoption in this country the sovereign will need not be evidenced by direct and express language. The sovereignty meant here is the act or assent of the law however established. When it is said in England that the creation of a corporation is the exercise of royal prerogative, it is meant that these political institutions must, in some form, have royal authority for their existence, which authority may be inferred as well from long acquiescence as from direct acts of recognition or appointment. So in several of the United States it is well settled that the right to enjoy and exercise a corporate franchise, need not necessarily rest upon an express legislative grant special or general, but may be acquired by prescription.[1]

§ 18. **Whether corporations may exist by prescription.**— Under the practice which prevailed in the United States, until a comparatively recent period, and still exists in some of the states, of creating corporations by special charter after the manner of the English govern-

3 Bland. Ch. (Md.) 407, 417; Stowe v. Flagg, 72, 111, 397; Hoadley v. County, etc., Essex, 105 Mass. 519; State v. Bradford, 32 Vt. 50. It is immaterial whether the legislative will be exercised in the form of special or general laws. Re Gilbert El R. Co., 70 N. Y. 361; People v. Bowen, 21 N. Y. 516.

[1] Thus where a body had held itself out as a corporation and had exercised corporate functions for a period of twenty years a legislative grant was presumed. All Saints Church v. Lorett, 1 Hall N. Y. 191; Rose Hill & E. R. Co. v. People, 115 Ill 133; 3 N. E. 725. But such rule is not recognized in all the states. In California the Supreme Court held that admitting a legislative recognition a corporation of that character (meaning a private corporation) could not be created by legislative recognition, the Constitution of California, Art. 4, Sec. 31, prohibiting the creation of corporations except for muncipal purposes otherwise than by general laws; Railroad Co. v. Plumas County, 37 Cal. 354; and it was held that a mere license to enter a state given to a railroad company of another state did not create a new corporation. Goodlett v. L. & N. R. R. Co., 122 U. S. 391; 7 S. Ct. 1245. See also O. & M. R. Co. v. Wheeler, 1 Black, 286, 393, 297; Railroad Co. v. Harris, 12 Wall. 65, 83; Railroad Co. v. Vance, 96 U. S. 450, 457; M. & C. R. R. Co. v. Alabama, 107 U. S. 581, 584; 2 S. Ct. 432; Penn. Co. v. St. L. A. & T. H. Co., 118 U. S. 290.

ment, there grew up certain rules of construction borrowed largely from that source, and applicable alike to corporations so chartered in both countries. While the system of principles thus built up apply, for the most part, to private corporations organized under general laws, yet those created by the method last mentioned present certain organic and functional phases, to which principles well recognized under the old practice are clearly inapplicable. While the courts have in a few cases tacitly acknowledged such to be the case, and decided contrary to long established precedent, they have been slow to set forth the reasons for a departure which it was necessary to take in order to meet the changed conditions. But the initiatory steps having been taken, the advance to new ground will doubtless proceed rapidly and surely. The principal recent divergence is that where there are general incorporation laws enacted under constitutions prohibiting the creation of any corporations, except municipal by special act, there can be no private corporations by prescription (which is a tacit sovereign recognition) nor even by express legislative recognition. In other words, where the claim of corporate existence and right to exercise a corporate franchise is called in question by a proper proceeding, nothing less than proof of substantial compliance with statutory provisions will support the claim.[1]

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[1] In People v. Stanford, 77 Cal. 351; 19 P. 693, the court said: "As against the state there is no presumption that citizens exercising a franchise, are exercising it rightfully . . . Even if it were conceded that under our law a franchise can be acquired by prescription, it would still be for the defendant in a proceeding like the present (quo warranto) to allege and prove the long continued use." See also People v. Cheesman 7 Col. 376; 3 P. 716. The New York & L. I. Bridge Co. was incorporated by Laws N. Y. 1867, c. 395, for the purpose of building a bridge. The bridge was to be built within a certain time, or all the rights and privileges of the petitioner under the act would cease. By Laws 1885, c 392, the period for the construction of the bridge was extended, and it was provided that it should be built for railway, foot and carriage travel. It was held that as the legislature had no power to make the provision for railroad travel, under Const. N. Y. art. 3, Sec. 18, providing that the legislature shall not pass a

But the existence of a right or title constituting an essential element of corporate existence may be established by prescription in this as in other cases.[1]

§ **19. Indirect authorization.**—Since in theory corporate powers are granted for the benefit or convenience of the public, the language creating them usually receives a liberal construction, the legislative intendment being often inferred from general and inexact terms.[2]

§ **20. Quasi corporations.**—However it may be in regard to prescriptive rights to corporate existence, there is no doubt that bodies may be so organized and constructed, by law, and given such powers as are inconsistent with other intention on the part of the legislature than that they shall exercise their powers in a corporate capacity. Often in the administration of governmental affairs and sometimes in the transaction

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private or local bill granting to any corporation the right to lay down railroad tracks, or provide for building bridges, and chartering companies for such purposes, the extension of time granted to the petitioner must fall with the condition upon which it was granted; and that an application of the petitioner to acquire certain lands must be denied, though at the time of such application, no bridge had been built nor any rails laid. In re New York & Long Island Bridge Co., 5 N. Y. S. 77; 7 N. Y. S. 445; 21 N. Y. S. Rep. 858.

[1] Where an association of proprietors of common land has, for more than 50 years, been in possession of the land, and has, during all that time, acted as a corporation under proceedings of incorporation regular on their face, the validity of the proceedings cannot be attacked by proof that the proprietors had not the kind of title necessary for a valid act of incorporation. Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, (Mass.) 26 N. E. 239.

[2] It is held that no special form of words is necessary to create a corporation by special act, and that a mere grant of power to perform corporate acts in itself implies a grant of corporate capacity. Com. v. West Chester R. R. Co., 3 Grants Cas. (Penn.) 200. And in another case that a mere grant of lands by the state to individuals to be possessed and enjoyed by them in a corporate character in itself conferred upon such individuals the right to take and hold in a corporate capacity. N. Hempstead v. Hempstead, 2 Wend. (N. Y.) 219. But in Southern Pac. R. Co. v. Orton, 32 Fed. R. 457, it was held that the granting of other than the specific franchise constituting a corporation and of other privileges and powers to a pre-existing corporation are not acts regulating the conduct of the existing corporation in its relation to and intercourse with the public and other persons natural and artifical.

of businses of a public nature, it becomes necessary for men to organize themselves into permanent collective bodies. Upon some of these the law has conferred rights and powers very like those enjoyed and exercised by corporations; and to that extent and no farther, they are corporations. To distinguish these from those regularly constituted and clothed with complete corporate authority, they are termed *quasi* corporations.[1] The people of a county are not a corporation in any sense nor are they recognized in law as capable of suing or being sued. But the country itself is a corporation and as such may become party to a suit.[2] But at common law all collective bodies of men, such as towns and parishes as had corporate capacities for specified purposes, though without the ordinary general powers of a corporation, were *quasi* corporations, and as such vested with powers coextensive with the duties imposed upon them by law.[3]

§ 21. **Official boards.**—State boards of Railroad Commissioners, Commissions of Horticulture, of Viticulture, State Labor and Mining Bureaus and the like are vested by law with powers similar to those exercised by municipal corporations among which are the powers to institute legal proceedings, to send for persons and papers, and compel obedience. With respect to such rights and powers they are to be considered as corporations. It may be stated generally that where bodies

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[1] Adams v. Wiscasset Bank, 1 Me. 361; Harrison v. Timmins, 4 M. & W. 510; Instances of *quasi* corporations are: Counties; Goodnow v. Commrs. Ramsey County, 11 Minn. 31, 41; Hannibal & St. Joseph R. Co. v. Marion County, 36 Mo. 294; School Dist. v. Thompson, 5 Minn. 286; Lawrence County v. Chattaroi R. R. Co., 81 Ky. 225; Hampshire v. Franklin, 16 Mass. 87.; Boards of Supervisors of Counties and County Commissioners; Board of Commrs. v. Mighels, 7 Ohio St. 109; Vankirk v. Clark, 11 Searg. & R. 28; Commrs. v. Gherky, Wright R. 493; Supervisors v. Bowen, 4 Lansing, 24.

[2] Smith v. Myers, 15 Cal. 33.

[3] Clarissy v. Metrop. Fire Dep't; 7 Abb. Pr. (N. S.) 353.

and political persons are created by law, and are charged with the administration of legal duties, and directed to adopt the necessary measures for enforcing obedience to their rules and respect for their authority, they are to that extent bodies corporate, and may be described generally as *quasi* corporations.[1]

§ 22. **Must have capacity to perpetuate itself.**—But in order to constitute a body a *quasi* corporation, there must be not only a distinct existence and the right to exercise some of the powers of corporations, but there must be a capacity to perpetuate its existence and such stability in its organization as entitles it to a standing in court as a political person.[2]

§ 23. **Joint Stock Companies.**—Joint Stock Companies may be cited as *quasi* corporations of a private character. They have some of the features of a copartnership

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1 See Dean v. Davis, 51 Cal 406. A Reclamation District is declared to be a public corporation, in People v. Rec. Dist. No. 108, 53 Cal. 546; People v. Williams, 7 Pac. C. L. J. 120; Hake v. Perdue, 62 Cal. 545. Additional examples of *quasi* public corporations are: Overseers of the Poor; Pittstown v. Plattsburg, 18 Johns, 407; Kewen v. Johnson, 3 Denio, 185; Armine v. Spencer, 4 Wend. 406; Palmer v. Vandenberg, 93 Wend. 193; County Supervisors v. Hartwell, 8 Johns, 424; Johnson v. Ostrander, 1 Cow. 670; Board of School Directors; Inhabitants of School District v. Wood, 13 Mass. 193; Lexington v. Mc.Quillan, 9 Dama, 519; Grant v. Francher, 5 Conn. 309; Dist. v. McCloon, 4 Wis. 79; Clarke v. School Dist. 3 R. I. 199; Horton v. Garrison, 24 Barb. 176; State v. Hullin, 2 Or. 306; Road Commissioners; Duntz v. Duntz, 44 Barb. 459.

2 It was held that the General Assembly of the Presbyterian Church is not a corporation in any sense. It is a segregated association, which though it is the productive organ of corporate succession, has no corporate quality. Comm. v. Green, 4 Whart. 531. Subordinate lodges of the I. O. O. F. organized by the Grand Lodge in Tenn. and vested by statute with power to take and hold title to property, were held to have continuing personality and to be capable of holding and administering a trust; but they were held not to be corporations. Heiskell v. Chichasaw, Lodge 87 Tenn. 668. For a case in which the facts were of peculiar historical interest and the exposition of the law on the subject able and exhaustive, see Baeder v. Jennings, 40 Fed. Rep. 199. But the fact that the business of a lumber company is conducted by a president and secretary raises no presumption of corporate existence. Clark v. Jones, 87 Ala. 474; 6 So. 362. See also Duggan v. Investment Co., 1 Colo. 113; Wood v. Construction Co., 56 Conn. 87; 13 A. 187.

and others of a private corporation. A joint stock company being, in legal effect, as respects its relations to the state and its liabilities to parties dealing with it, a copartnership[1] need have no statutory authority

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(1) Kellogg Bridge Co. v. U. S. 15 Ct. Cl. 111; Cross v. Jackson, 5 Hill, 478; Boston & Albany R. R. Co. v. Pearson, 128 Mass. 445; Kramer v. Arthurs, 7 Pa. St. 165; Wescott v. Fargo, 61 N. Y. 542; Skinner v. Dayton, 19 Johns. 513; Wells v. Gates, 18 Barb. 554; Taft v. Ward, 111 Mass. 518; Cutter v. Estate of Thomas, 25 Vt. 73; Frost v. Walker, 60 Me. 468; Gott v. Dinsmore, 111 Mass. 45; Newell v. Borden, 128 id. 31; Keasley v. Codd, 2 Carr. & P. 408; Moore v. Brink, 4 Hun, 402. In Taylor v. Ifill, 1 N. Y. 576 it was held that the transferree in an unincorporated joint stock company was liable for all debts existing before or subsequent to the transfer. In Lewis v. Tilton, 64 Ia. 220, the court say :—"It is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence," and held the officers entering into a contract for the company personally liable. See also Reding v. Anderson, 34 N. W. (Ia.) 300; Phillips v. Blatchford, 137 Mass. 510; Davidson v. Holden, 10 A. (Conn.) 515; Fredenhall v. Taylor, 26 Wis. 220. In Dayton &c. R. R. Co. v. Hatch 1 Sis. Cin. S. Ct. (Ohio) 849 the Court say : " As no one is bound to own property in indivision, it follows that such owners who wish a division have a right to have that property sold, and after a liquidation of the affairs of the concern to have the residue distributed ratably among themselves." Compare Chandler v. Brainard, 31 Mass. 285; Irvine v. Forbes, 11 Barb. 587; Ridenour v. Mayo, 40 O. St. 9; Manning v. Gasharie, 27 Ind. 399; Livingston v. Lynch, 4 Johns. Ch. 573; Frost v. Walker, 60 Me. 468; Townsend v. Goewey, 19 Wend. 423. The same duties as to giving notice of an interest by one of the holders of the stock as in an ordinary copartnership. Shamburg v. Abbott, (Pa.) 4 A. 518. At common law the members of a voluntary association are in legal effect partners and should be sued as such. Pipe v. Bateman, 1 Ia. 369; Williams v. B'k of Mich., 7 Wend. 542; Wells v. Gates, 18 Barb. 554; Hess v. Werts, 4 S. & W. (Pa.) 356. Their relation is not altered by statute in Cal. Sec. 368. C. C. P. As to what constitutes doing business under a common name, see Swift v. S. F. S. & E. Board, 67 Cal. 567; 8 P. 94. The same rule of practice applies where the business is done under a common name as if the associates were partners. Sec. 388. C. C. P. of Cal. and similar statutes are permissive and the parties behind the common name may still be individually sued. Whitman v. Keith, 18 Ohio St. 134; Feder v. Epstein, 66 Cal. 456, 458; Davidson v. Knox, 67 Cal. 143. To same effect Iron Works v. Davidson, 3 Cal. 389; see also 75 Cal. 590. The New York Code, Civil Procedure, Sec. 1919, differs from Sec. 388 Cal. C. C. P. in allowing the suit against the association in the name of its president or treasurer. It is therefore held that the liability of members is neither extended or lessened by such statute, and they may still be sued directly on their individual liability. Kingsland v. Braisted, 2 Lans 17; Park v. Spaulding, 10 Hun, 128.

The name assumed by parties in their dealings is not decisive of their capacity or of the character of their association. In Lawler v. Murphy, 58 Conn. 294; 20 A. 457, it was held that a certificate reciting a contract between the holder and

for its creation[1] although the creation of, such companies is sometimes authorized by statute.[2] There

the state Insurance Fund A. O. H., and signed by its officers, the personal liability of the latter is sufficiently shown by a complaint which alleges that they were jointly engaged in carrying on a life-insurance business, and entered into the contract under the name of the "State Insurance Fund A. O. H."

It is generally not necessary to sue all the members where plaintiff elects to proceed against them personally instead of proceeding against the common property. See Wood v. Draper, 24 Barb. 187; Pipe v. Bateman, 1 Iowa, 369; Phipps v. Jones, 20 Pa. St. 260; Mandeville v. Riggs, 2 Pet. 482; Smith v. Lockwood, 1 Code Rep. N. S. 319; Snow v. Wheeler, 113 Mass. 179; Birmingham v. Gallagher, 112 Mass. 190; Lloyd v. Loaring, 6 Ves. 773; Deems v. Albany & V, Line, 14 Blatchf. 471. But one of the associates cannot sue without joining the others with him unless he sue in a representative capacity. Liggett v. Ladd Or.), 21 P. 133.

(1) Lindley on Partnership, 192. This authority after citing and commenting on various English cases in a note thus concludes.—"The case of Blundell v. Winsor, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench, nor has it ever been followed. Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares, and not incorporated by charter or act of parliament, is illegal at common law; that opinion have nevertheless differed upon this question; that the tendency of the courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her majesty's subjects. The legality at common law of such companies may therefore be considered as finally established." He cites and discusses Rex v. Dodd, 9 East. 406; Buck v. Buck, 1 Campb. 547; Duverger v. Fellows, 5 Bing. 248; Josephs v. Pebrer, 3 B. & C. 639; R. v. Stratton, 1 Campb. 549, n.; Blundell v. Winsor, 8 Sim. 601; 10 B. & C. 826; Kinder v. Taylor, Coll. on Partn. 917, 2nd. Ed., holding unincorporated associations with transferable shares to be illegal, and Sheppard v. Oxenford, 1 K. & J. 491; Ex parte Barclay, 26 Beav. 177; R. v. Webb, 14 East. 516; Nockels v. Crosby, 3 B. & C. 814; Pratt v. Hutchinson, 15 East. 511; Ex parte Aston, 27 Beav. 474; Walburn v. Ingilby, 1 M. & K. 61; Kimpson v. Saunders, 4 Bing. 5; Brown v. Holt, 4 Taunt. 587; Ellison v. Bignold, 2 J. & W. 510; Ex-parte Grisewood, 4 De G. & J. 544; Garrard v. Hadley, 5 Man. & Gr. 471; Harrison v. Heathorn, 6 Man. & Gr. 81, holding the contrary. Most of the English cases which insist upon the illegality of joint stock associations are found upon examination to have been largely influenced by the iniquitous practices under the Bubble Act in force from 1720 to 1826. The view in Massachusetts was thus expressed by the court in Phillips v. Blatchford, 37 Mass. 510, "It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. . . . . . The grounds upon which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times." See also Snow v. Wheeler, 113 Mass. 179; Townsend v. Goewey, 19 Wend. 423.

2 When organized under statutory authority as they may be in England, in New York and perhaps one or two other states they resemble corporations more than copartnerships, though declared not to be the former. The only respect

are, however, at least two exceptions to this rule. In Louisiana[1] and Illinois[2] joint stock companies in which shares are issued to represent the separate inter-

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in which a joint stock company whose capital is divided into shares and made transferable resembles a copartnership consists in the fact that its members are still held to unlimited liability to creditors and partners. Joint stock companies may be organized in New York under Sess. Laws 1854, ch. 245; Sess. Laws 1858, ch. 172; Sess. Laws 1867, ch. 289; Sess. Laws 1868, ch. 290; Sess. Laws 1881, ch. 599. For cases arising under these various acts see Leavitt v. Yates, 4 Edw. 134; B'k of Watertown v. Watertown, 25 Wend. 686; Boisgerard v. N. Y. Bkg. Co., 2 Sandf. ch. 231; Gifford v. Livingston, 2 Den. 380; Warner v. Beers, 25 Wend. 103; Willoughby v. Comstock, 3 Hill, 389; People v. Niagara, 4 Hill, 20; Matter of B'k of Danville, 6 Hill, 370; Leavitt v. Blatchford, 17 N. Y. 521; Tracy v. Talmage, 18 Barb. 456; Talmage v. Pell, 7 N. Y. 328; Falconer v. Campbell, 2 McLean, 195; Duncan v. Jones, 32 Hun, 12; Culver v. Sanford, 8 Barb. 225. The only effect of the statutory declaration that they are not corporations is to fix the liability of the members as copartners, Boston & Albany R. R. Co. v. Pearson, 128 Mass. 445; Oliver v. Liverpool & London Life & Fire Ins. Co., 100 Mass. 531, and depriving them of the limitation in that respect incident to corporate membership. They are treated by the courts generally as corporations. See Fargo v. Louisville, New Alb. & Chicago Ry. Co., 6 Fed. Rep. 787; Waterbury v. Merchants' Union Ex. Co., 50 Barb. 157; Liverpool Ins. Co. v. Mass. 10 Wall. 566; Oliver v. Liverpool & London Fire Ins. Co., 100 Mass. 531; Sanford v. B'd of Supervisors of N. Y., 15 How. Pr. 172. They are also treated as corporations under tax laws. People v. Wemple, 52 Hun, 434; but they cannot sue as such in the federal courts. Chapman v. Barney, 129 U. S. 677.

[1] State v. American, etc., Trust, 40 La. Ann. 8; 3 So. 409; 1 Ry. Corp. L. J. 509. In Factors', etc., Ins. Co. v. Harbor, etc., Co., 37 La. Ann. 233, 239, such an organization was described as "a nondescript organization, composed of the owners of certificates showing the proportion of their respective interest in its assets and liability for its obligations, and who are co-owners or proprietors in common. As no one is bound to own property in indivision, it follows that such owners who wish a division have a right to have that property sold, and after a liquidation of the affairs of the concern to have the residue distributed ratably among themselves."

[2] In Green et al. v. People ex rel., etc. (Ill.), 21 N. E. 605, it was held that "an association or number of persons, who, in conducting the business of insurance, profess to limit their liability to the amount of money contributed by each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representatives, are "acting as a corporation," so as to authorize a judgment of ouster on *quo warranto* under Rev. St. Ill. 1874, c. 112, where they are not legally incorporated. The Court said:—"We think it clear that, in two respects at least, these respondents are acting as a corporation, and in pretending that they are actually incorporated, namely: First—in professedly limiting their liability to the amount of money contributed by each; second—in assuming to give perpetuity to the business by making membership certificates transferable by the assignment of the member or his personal representative. It may be, as con-

ests of members and made transferable are held illegal as usurpations of corporate functions. A joint-stock company has been defined as "a partnership whereof the capital is divided or agreed to be divided into shares and so as to be transferable without the express consent of all the copartners."[1] From this definition, it is seen that the object of forming such associations is to enjoy some of the benefits of corporate organization without actually becoming incorporated.[2] But be-

tended by counsel, that individuals may insure property against loss by fire. They cannot limit their liability to any given amount of capital they choose to set apart for that purpose, nor can they perpetuate the business without change of capital, beyond their own lives indefinitely. These things can only be done by a corporation."

[1] Horne's Appeal, 63 Pa. St. 273. Regularly organized corporations are in Mass. designated as joint stock companies. Atty.-Gen. v. Mer. Ins. Co., 121 Mass. 524. But they have few rights and immunities of an ordinary corporation however much their articles of association resemble the constating instruments of the latter. The object of these in a joint-stock company is to "regulate the duties of the officers and the duties and obligations of the members of such a company among themselves; they specify the capital, limit the duration and define the business of the company." Bray v. Farwell, 81 N. Y. 600. See also White v. Brownell, 42 Abb. Pr. N. S. 162, 193; Robbins v. Butler, 24 Ill. 387, 426, 432.

[2] They may perpetuate in themselves and their successors the ownership of real estate, by having it conveyed to the trustees of the association. This was a feature of the English Cost Book Mining Companies which existed in the counties of Cornwall and Devonshire, England about the year 1850. For a full explanation of their plan of organization and of conducting business consult In re Wrysgan Co., 5 Jur. N. S. 215; In re Prosper, etc., Co. L. R., 7 Ch. 286; Hybart v. Parker, 4 C. B. N. S. 209; Kittow v. Liskeard Union, L. R. 10 Q. B. D.; In re Bodwin, etc., Co., 23 Barb. 370; Ex parte Chippendale, 4 De G. M. & G. 19, 52; Lanyon v. Smith, 3 B. & S. 938. The associates in a cost book mining venture were uniformly held liable as partners. Johnson v. Goslett, 18 C. B. 728; aff'd in, 3 C. B. N. S. 569; Northey v. Johnson, 19 L. T. 104; In re Wrysgan, etc., Co., 28 L. J. (Ch.) 894; Mayhew's Case, 5 De G. M. & G. 837; Thomas v. Clarke, 18 C. B. 662; Newton v. Daly, 1 F. & F. 26; Teake v. Jackson, 15 W. R. 338; Fenn's Case, 4 De G. M. & G. 285; Harvey v. Clough, 8 L. T. N. S. 324; Birch's Case, 2 De G. & J. 10; Ellis v. Schmoeck, 5 Bing. 521; Tredwell v. Bourne, 6 M. & W. 461; Hart v. Clarke, 6 De G. M. & G. 232. For cases governed by similar principles as those governing cost-book mining companies, see, generally, Treat v. Hiles (Wis.), 32 N. W. Rep. 517; Ward v. Davis, 3 Sandf. Rep. (N. Y.) 502; Watson v. Spratley, 10 Ex. 222; Hayter v. Tucker, 4 K. & J. 243; Mallory v. Russell, 32 N. W. Rep. 102; Holmes v. Mead, 52 N. Y. 332; Powell v. Jessop, 18 C. B. 336; Sparling v. Parker, 9 Beav. 450; Owens v. Missionary Soc. of the M. E. Church, 14 N. Y. 380; Webb v. Wetherhead, 17 How. 576; Goesselle v. Bimeler, 5 McLean, 223; Gerard's Titles to Real Estate, p. 490;

tween ordinary partnerships and corporations in the fullest sense, are found every possible variety of association. The real character of the organization must in each case be determined by reference to the laws and articles of agreement under which it is formed.[1]

§ 24. **Agricultural Societies.**—A county agricultural society organized under an act of a state legislature, by persons, and authorized to adopt a constitution and by-laws, to appoint the customary officers, to become a body corporate, with capacity to sue and be sued, "and perform all such acts as they deem best calculated to promote agricultural and household interests" of the county and state, of holding real estate for its purposes, and receiving and accepting aid from the county, was held to be neither a public nor a *quasi* public but a private corporation aggregate, and as such liable out of its property and estate for negligence. In Dunn *v.* Brown County Agricultural Society[2] the Court say: "It is true their purpose may be public in the sense that their establishment may conduce to the public welfare by promoting the agricultural, household and manufacturing interests of the county; that in the sense that they are designed for the accomplishment of some public good all private corporations are for a public purpose, for the public benefit is both the consideration and the justification for the special

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German Land Association v. Scholler, 10 Minn. 331; Sherwood v. Am. Bible Soc., 4 Abb. Pr. 227; Byam v. Beckford, 140 Mass. 31; White v. Howard, 46 N. Y. 144; Trustees, etc., v. Hart's Ex'rs, 4 Wheat. 1; McKeon v. Kearney, 57 How. Pr. 349; African, etc., Ch. v. Conover, 27 N. J. Eq. 157; Peabody v. Eastern Methodist Soc. in Lynn., 87 Mass. 540; Chapin v. First, etc., Soc., 74 Mass. 582; Gibson v. McCall, 1 Rich. 174; Leonard v. Davenport, 58 How. Pr. 384; Towar v. Hale, 46 Barb. 361.

[1] There is not known to the laws of Massachusetts any intermediate form of organization between a corporation and a copartnership. Ricker v. Am. L. & Tr. Co., 140 Mass. 346; 5 N. E. 284.

[2] (Ohio) 25 Am. & Eng. Corp. Cas. 467.

privileges and franchises conferred on them. These agricultural societies are not only of the free choice of their constituent members, but they are also by their active procurement; for it is only when they organize themselves into a society, adopt the necessary constitution and elect the proper officers that they become a body corporate, The State neither compels their incorporation, nor controls their conduct afterwards.[1]"

§ 25. **Irrigation Districts.**—The subject of irrigation has become of vast and is of increasing importance in a number of Western and Pacific states and territories. From the very nature and necessities of the case, the supplying of water from a common source to a community of separate interests can only be accomplished by corporations operating on an extensive scale. Great waste and inequality are inseparable incidents to the use of water in agricultural development, and common observation would seem to teach that economy and

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[1] P. 471, 472. The only decision on the question of the liability of agricultural societies to actions for negligence prior to this decision was the case of Brown v. South Kennebec Agricultural Society, 47 Me. 245. The Maine case like the Ohio case holds that an agricultural society is distinguishable from a *quasi* corporation in several essential particulars; and like an individual is responsible for injuries resulting from want of ordinary care and foresight; but that the liability is corporate, to satisfy which only corporate property can be levied upon. It is a well established principle in both England and America that at common law private actions cannot be sustained against *quasi* corporations for neglect to perform a public duty. See Eastman v. Meredith, 36 N. H. 284, where Perley, C. J., in a very able and learned opinion classifies and to a certain extent reconciles the various decisions involving that question. In Biddle v. The Locks and Canals, 7 Mass. 187, the Court said: We distinguish between proper aggregate corporations and the inhabitants of any district who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations; of this description are counties and hundreds in England, and county towns, etc., in this state. Although *quasi* corporations are liable to information or indictment for neglect of a public duty imposed upon them by law, yet no private action can be sustained against them for a breach of their corporate duty unless such action is given by statute. And the reason is that having no corporate existence and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. See also Adams v. Wicasset Bank, 1 Maine, 361.

beneficial results increase in proportion to the extension and inclusive magnitude of systems. The best thought conversant with the science and practice of irrigation, favors governmental supervision and control. Superintendence and direction by the federal government or even direct state control would hardly be tolerated; but the management of extensive systems through municipal districts has been tried and results of such experiments have been very satisfactory and full of promise for the future.

So far as one may judge from so youthful an enterprise, inaugurated under recent and novel statutory provisions, these corporations, termed by the courts "*quasi* public," are to become a fruitful subject for litigation involving the most important and valuable interests.

The range of objects and number of persons interested in the corporate enterprise is not the only, if indeed any reason for terming such corporations *quasi* public. It is because they are empowered by statute to exercise important functions of government.[1]

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[1] Turlock Ir. Dist. v. Williams, 76 Cal. 360, 372; 18 P. 360; Cent. Ir. Dist. v. DeLappe, 79 Cal. 351 365; 21 P. 825; Supervisors v. Tregea, (1891) 88 Cal. in press; Crall v. Directors Poso Dist. (1891) 87 Cal., in press; Tide Water Co. v. Coster, 18 N. J. Eq. 521; 90 Am. Dec. 634; Hartwell v. Armstrong, 19 Barb. 166; Lux v. Haggin, 69 Cal. 303; 10 P. 674; Gilmer v. Lime Point, 18 Cal. 252; Cooley on Taxation, 2nd Ed. 103; Olmstead v. Camp, 33 Conn. 532; 89 Am. Dec. 221; Talbot v. Hudson, 82 Mass. 417; Coomes v. Burt, 39 Mass. 427; Wurts v. Hoagland, 114 U. S. 606; Head v. Amoskeag Mfg. Co., 113 U. S. 9; 5 S. Ct. 441; Hagar v. Reclamation Dist., 111 U. S. 701; 4 S. Ct. 663; Hager v. Yolo County, 47 Cal. 222; Reclamation Dist. v. Hager, 66 Cal. 54; 4 P. 945; C. W. & Z. R. R. Co. v. Com. Clinton Co., 1 Ohio St. 94; Barbier v. Connelly, 113 U. S. 27; 5 S. Ct. 357; S. & V. R. R. Co. v. Stockton, 41 Cal. 147. Irrigation districts are created in Cal., under act of 1887, Sess. Laws, p. 29, commonly called the "Wright Act," to which important amendments were made in 1889 and in 1891. The most important features of the law are: The jurisdiction of county commissioners to designate boundaries and make the necessary orders for organization; the election of directors and other officers by qualified electors within the prescribed boundaries in similar way to that in which state and county officers are elected, and making returns to supervisors who declare the result and issue commissions; the vesting of power in the board of directors to

§ 26. Reclamation and drainage districts.—The analogy between reclamation and irrigation districts, as regards their functional character and relation to the state is very close, both being regarded as *quasi* public. The purpose of the one is to make large bodies of land fit for cultivation by removing the excess of water, and of the other to accomplish the same object by distributing water over the land. Their general powers are similar in many respects and they are organized upon the same plan.[1]

change the boundaries so as to include other lands upon petition of the owners thereof and approval by vote of the landowners within the existing district; the power to tax for the corporate purposes, to incur indebtedness and issue corporate bonds to represent the same, and to appropriate public and private property upon making compensation. The constitutionality of the act was strongly contested in a case which arose soon after its approval, and the act was declared constitutional. Turlock Ir. Dist. v. Williams, 76 Cal. 360, 372; followed in Cent. Ir. Dist. v. DeLappe, 79 Cal. 351, 365; Supervisors, etc., v. Tregea (1891) 88 Cal. in press, and in Crall v. Directors Poso Ir. Dist. (1891) 87 Cal. in press.

[1] Cent. Ir. Dist. v. DeLappe, 79 Cal. 351, 365; 21 P. 825. See also Dean v. Davis, 51 Cal. 410; People v. Rec. Dist. 53 Cal. 348; People v. Williams, 56 Cal. 647; Hope v. Perdue, 62 Cal., 546; People v. La Rue, 67 Cal., 528; 8 P. 84. The charge imposed for the purpose of paying the bonds is strictly an assessment for local improvements and not a general tax; consequently the methods adopted for enforcing the assessment need not conform to the requirements of the Constitution in reference to general taxation. Dillon on Munic. Corp. 752; Desty on Tax., 151–171; Cooley on Taxation, 639; Goodrich v. W. & D. T. Co., 26 Id. 119; Creighton v. Scott, 14 Ohio St. 438; Seattle v. Yesler, 1 Wash. 571; Dailey v. Swope, 47 Miss. 367; Mason v. Spencer, 35 Kan. 512; McGehee v. Mathis, 21 Ark. 40; Emery v. S. F. Gas Co., 28 Cal. 346; Burnett v. Sacramento, 12 Cal. 76; 73 Am. Dec. 518. The legislature has constitutional authority to commit the power to levy the assessment to a special board. Hager v. Reclamation Dist. No. 108, 111 U. S. 701. It is not necessary that the local improvement for which the assessment is levied should be confined within the district taxed. Pattison v. Yolo County, 13 Cal. 189. The legislature has power to determine all questions of policy involved in the formation of an irrigation district and may delegate such power to boards of supervisors or other subordinate bodies. Pearson v. Zable, 78 Ky. 170; Cooley on Tax. 150; Kelsey v. Trustee of Nevada, 18 Cal. 630; Desty on Tax. 1247; Hager v. Reclamation Dist. No. 108, 111 U. S. 701; Abbott v. Dodge, 18 Neb. 1240. The mode provided by the Cal. Act of 1887, Sess. Laws, p. 29, as subsequently amended for the levy and collection of the assessment is not a denial of due process of law. Davidson v. New Orleans, 96 U. S. 97; Hager v. Yolo County, 47 Cal. 222; Burroughs on Taxation, sec. 145; Hager v. Reclamation Dist. No. 108, 111 U. S. 708.

§ 27. **Private irrigation corporations.**—In addition to the comparatively few irrigation districts formed under the recent California law, there are, in that state, and in others, and in one or two territories, many private corporations formed under general incorporation laws carrying on the business of supplying water for irrigation purposes both to rural and urban populations to an important extent. The litigation concerning these, has developed but few principles of corporation law not applicable alike to them and other private corporations, and need not be here further noticed. Many such cases are incidentally cited in divers connections throughout this work.

§ 28. **Powers of Congress and State Legislatures to create corporations.**—Although the constitution is silent on the question of the power of Congress to grant charters to corporations, the power is exercised as incidental to the carrying out of those powers expressly conferred.

The determination of the right of Congress to grant a charter in any given case, turns upon the question whether it is an appropriate means of accomplishing the object contemplated, and whether the object itself is constitutional. If both these tests are affirmatively determined, courts have never presumed to inquire into the expediency or necessity for adopting that method of accomplishing its object. Since the constitutionality of acts of Congress creating corporations was established in the case of McCullough v. Maryland,[1] Congress has often exercised this power as a means of executing public enterprises of great importance. The Pacific Railroad Companies and the National Banks are familiar instances.[2]

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[1] 4 Wheat 316.

[2] For a learned discussion of this once great constitutional issue, see the reply of Alexander Hamilton, when Secretary of the Treasury, to the Secretary of

§ 29. **Constitutional limitations.**—Constitutional prohibitions of the creation of corporations by special acts of the legislature and limitations of the exercise of that process to general enactments, owe their origin partly to abuses of the power to incorporate by special act, and to the opportunities it afforded for favoritism and corruption, and partly to the convenience and justice of uniform provisions affecting all impartially and available at all times. No resort to indirect means or subterfuges designed or calculated to create a corporation or confer corporate privileges other than or additional to those provided for in the general law are allowed to prevail.[1] The constitutional provisions on the subject in the different states vary but little, but in some the exception is broader than in others. In Maryland[2] private corporations may be created by special act when no general law exists for the creation of corporations of the same general character as that proposed in the special act.[3]

A legislative recognition of the existence of a body

State and Att.-General. 1 Hamilton's Works, 111, and Message of President Madison, Dec., 1815. The State Legislatures have so long and often exercised the right to grant corporate privileges on such obvious grounds that no discussion of the origin or nature of that right is necessary further than to say that it is a part of the sovereign power which they may exercise to any extent on all subjects when not prohibited expressly or inferentially by the national or by state onstitutions. The reasoning employed by the courts in justification of the right of Congress to legislate on this subject applies equally to the right of a state government. See the opinion of the Court in McCullough v. Maryland, supra.

1 Ex. parte Pritz, 9 Iowa, 30; San Francisco v. Spring Valley W. W. Co., 48 Cal. 493, 515; over-ruling California State Tel. Co. v. Alta Tel. Co. 22 Cal. 98. See Southern Pacific R. R. Co. v. Orton, 6 Sawy. 157, 186.

2 Const. Md., Art 3, Sec. 48.

3 An act incorporating the Baltimore Trust & Guarantee Company, and authorizing it to accept and execute trusts of every description, to act as guardian, executor, receiver, etc., as a safe-deposit company, and to exercise numerous other powers, is not void, for the general law (Code Md. art, 23, Sec. 29) providing for the formation of "Savings institutions, trust companies, and guaranty companies" does not confer the powers granted by the special act. Reed v. Baltimore Trust & Guarantee Co., (Md.) 20 A. 194; Bell v. Mercantile Trust & Deposit Co., Id. 195; Chapter 346, Laws Wis. 1889.

claiming to be a corporation, but without proper authority ratifying its claim, is clearly unconstitutional and void.[1]

But the power of congress not being limited in this respect by constitutional provisions may give valid and binding recognition to a corporation whether claiming existence under state or national laws or the concurrent acts of both sovereignties.[2]

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[1] Oroville, etc., R. R. Co. v. Plumas Co., 37 Cal. 354. A similar decision was made where by a special act purchasers under a foreclosure sale of the property of a railroad company were given authority to organize and form a corporation with the same rights and franchises as belonged to the corporation whose property was taken, there being a constitutional provision that "The General Assembly shall pass no special act conferring corporate powers." Atkinson v. Marietta, etc., R. R. Co., 15 Ohio St. 21.

[2] Act Cong., July 27, 1866, recognized the Southern Pac. R. R. Co., organized under a general law of California, and made it certain grants of land. Pursuant to Act Cal. Leg., March 1, 1870, authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association, and Act April 4, 1870, in terms authorizing the S. P. R. R. Co. to file new and amendatory articles of association to enable it completely to conform to Act Cong., July 27, 1866, the S. P. R. R. Co. and other railroads, October 11, 1870, filed articles amalgamating and consolidating themselves into a new corporation,—S. P. R. R. Co. Act Cong., March 3, 1871, authorized the S. P. R. R. Co. of California (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the T. P. R. R. at or near the C. river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said S. P. R. R. Co., of California, by Act July 27, 1866. *Held*, that Congress thereby recognized that the S. P. R. R. Co. of California, existing March 3, 1871, under the articles of amalgamation and consolidation of October 11, 1870, was the same S. P. R. R. Co. to which the grant of July 27, 1866, was made. United States v. Southern Pac. R. Co., 45 F. 596; Same v. Colton Marble & Lime Co., Id. So an act providing that any number of resident members of a church "may form such corporation;" that the first nine members signing the articles shall be directors thereof until others are elected; that certain policy-holders shall be members "of the corporation;" that "its" officers shall make a verified report of "its" doings; that every member of "this organization" shall notify "the" secretary of certain occurrences; and that any member of "this corporation" may withdraw therefrom, shows a legislative intention to indirectly authorize the organization of one corporation only for the specified purposes, and is therefore in contravention of the amendment (1871) to article 4, Const. Wis. Sec. 31, subd. 7, prohibiting "special" or "private" legislation granting corporate "powers" or "privileges," except to cities, and section 32, providing that the purposes of such prohibited legislation can only be effected by general laws of uniform operation, and the act is unconstitutional and void. State v. Cheek, (Wis.) 46 N. W. 163.

§ 30. Cannot create by amendment of charter.—Every alteration of a contract implies a new contract, and every amendment of a charter, if allowed, grants a new charter. But there are cases in which additional provisions have been made by the legislature, notwithstanding the constitutional prohibition, and upheld by the courts on the ground that they could not be with propriety called the creation of a corporation.[1] At any rate the legislature may, by special act relegate or grant to an existing corporation new privileges, if by so doing its character is not altered, and such act is not open to the objection that it impairs the obligation of contracts by releasing the shareholders.[2]

§ 31. Delegation of power to incorporate.—In England, it is a well established doctrine that Parliament with the consent of the Crown, or the King alone, can delegate the power of conferring corporate privileges, though at a former period the right even of the King to grant a license to another to exercise this power was denied. Corporations created by proprietaries of Pennsylvania

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[1] Colton v. Mississippi Boom Co., 22 Minn. 372; St. Paul Fire, etc., Ins. Co. v. Allis, Minn. Sup. Ct. 1889. An act of the Alabama legislature authorizing a railroad company to change its name and to purchase the railroad and franchises of another company was upheld by the Supreme Court of the United States. Wallace v. Loomis, 97 U. S. 146.

[2] Everhart v. Westchester, etc., R. R. Co., 28 Pa. St. 339; Gray v. Monongahela Nav. Co., 2 W. & S. 156; Clark v. Monongahela, Nav. Co., 10 Watts, 364; Cross v. Peach Ry, Co. 90 Pa. St. 392; Poughkeepsie, etc., Plank-road Co. v. Griffin, 24 N. Y. 150; Delaware, etc., R. R. Co. v. Irick, 3 Zabinskie, 321. In Fry Extr. v. Lexington, etc., R. R. Co., 2 Met. (Ky.) 322, the court said: "If it (the company) should avail itself of such provisions in the amendment as are calculated to aid in the accomplishment of the original undertaking, and are entirely consistent therewith, it will have the right to do it. Every stockholder in a railroad company which is organized for the purpose of constructing a railroad comes under an implied agreement that such amendments may be required to carry the original design into complete effect. The corporation still has the power to execute the primary object of its creation and if it should not attempt to use the means of the shareholders for any other purpose, they cannot claim to be absolved from their obligation to pay the amount of their subscriptions." See also So. Pac. R. Co. v. Orton, 6 Sawy. 157; Att'y.-General v. N. A. L. Ins. Co., 82 N. Y. 172.

under delegated authority from the Crown of England before the Revolution, were recognized afterward as valid. Similar powers were also exercised in Maryland under royal sanction, during the provincial government. In these cases the persons to whom these powers were delegated, exercised them as instruments in the hands of the government, under the familiar maxim "*qui facit per alium facit per se.*" In but few instances, has such power been exercised in this country under a delegation of authority from a State legislature.[1]

§ **32. Territorial corporations.**—The authority of territorial governments in the creation of corporations has always been liberally used but is now regulated and limited by a general statute.[2] But when territorial governments before the enactment of a general law on the subject created corporations their legal existence was uniformly recognized as being created under a delegation of power from the Federal government, the right being reserved in Congress to disapprove and revoke any act passed by territorial legislatures.[3]

§ **33. States cannot delegate the authority.**—But state governments as now constituted being themselves agents of a still greater sovereignty, the people, from whom, in constitutions, they derive their powers, cannot delegate their trust in the matter of creating corporations any more than in any other species of legislation. "One of the settled maxims of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that de-

[1] In the Case of St. Mary's Church, 7 S. & R. 517, a similar power was delegated by the Pennsylvania legislature and its exercise recognized as valid.

[2] Sec. 1889, Rev. Stat. U. S. Laws N. Y. 1884, c. 252, sec. 14, is not unconstitutional on the ground that it constitutes a delegation of legislative power in requiring the consent of roads already occupying a street, before another street railroad can be built upon such street. In re Thirty-Fourth St. Ry. Co., 102 N. Y. 343; 7 N. E. 172.

[3] Riddick v. Amelin 1 Nev. 5; Late Corporation, etc. v. United States, 136 U. S. 1; 10 S. Ct. 792.

partment, to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain."[1] There are several cases which apparently conflict with the principle here declared, but it is thought that a thorough examination of them will show the soundness of the above doctrine. City authorities are generally given important controlling powers over street railways. But the authority so conferred cannot be exercised so as to grant street car companies any new franchises.[2] In the case of the New York Elevated Railroad Company,[3] an act

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[1] Cooley's Const. Lim., 116.

[2] Mattlage v. N. Y. El. R. Co., 14 Daly 1. Act N. Y. 1867, authorizing the construction of an elevated street railway in the city of New York on Greenwich street and on Ninth Avenue, or streets west of Ninth Avenue, and authorizing the railway company "to rent, purchase, or acquire such buildings or parts of buildings as may be convenient for the stations or depots for public access to the railway," did not empower the company to build stations in or over any streets except those in which it was authorized to lay its tracks. See Canal, etc., St. Ry. Co. v. Crescent City R. Co., 41 La Amer. 561; Taylor v. Bay City St. Ry. Co., 80 Mich. 77; 45 N. W. 335; In re Rochester El. Ry. Co., 57 Hun, 56; 10 N. Y. S. 379; Passenger Ry. Co. v. Easton, 7 Pa. Co. Ct. Rep. 569, 577; Harrisburg City Pass. R. Co. v. Harrisburgh, id. 584, 593; People v. Gilroy (Matter of Third Ave. R. Co.), 56 Hun, 537; 9 N. Y. S. 833.

[3] 70 N. Y., 327, 343. Under Laws N. Y. 1884, c. 252, § 3, requiring a street railway company incorporated under that act, before constructing its railroad, to obtain the consent in writing of the owners of one-half in value of the property bounded on, and of the local authorities having control of, that portion of a street on which it is proposed to construct such railroad, a petition by such a company, for the appointment of commissioners to determine the points of crossing of its railroad over another, must contain an allegation that such consents have been obtained; notwithstanding section 1 of the act confers on such companies all powers granted by the general railroad act, and that act does not require such consents to be obtained. Distinguishing In re Lockport & B. R. Co., 77 N. Y. 558; In re Saratoga Electric R. Co., 12 N. Y. S. 318.

The charter of the Brooklyn Elevated Railway Company (Laws N. Y. 1874, c. 585) required that iron columns should be placed on each side of the streets, etc., "on a line with the curbstone," their location to be subject to the approval of the city engineer; and that iron girders, not more than 36 feet in length, should be placed "across" the streets, and be properly attached to the top of said columns. An amendatory act (Laws N. Y. 1875, c. 422) required that iron columns should be placed on each side of the streets, "as near as practicable on a line parallel with the curbstone," subject to the approval of the city engineer, and that iron girders should be placed "above" the streets, and be properly at-

providing for the incorporation of underground railroads had conferred the power on certain commissioners to determine the necessity for such railroads, fix the routes upon which they should be located, and to prescribe the plans for their construction. It was held that notwithstanding the fact that a determination of these matters was left to commissioners, the act rested upon the legislative will, and in no way depended for its validity upon the action of the commissioners, and that corporations organized under the act derived their franchises from the legislature and in no proper sense from the commissioners. The same may be said of all officers clothed by statute with the performance of ministerial duties during the process of perfecting corporate organization under specific grants or under general laws. They are merely instruments for executing the legislative will, and upon this view all the cases on this subject may be harmonized to the effect that the maxim *delegata potestas non potest delegari* applies alike to the power of legislatures to create corporations and to cases involving special fitness of a trustee or agent.[1]

tached to said columns. The road, as constructed, had its line of columns in the street, there being a space of eight feet eight inches between the curb and the foundation, and eight feet four inches between the foundation of the two lines of columns. *Held*, that the location was such as the act of 1875 authorized the company to adopt, and, having been approved by the city engineer, was lawful. Affirming 11 N. Y. S. 161. In re Brooklyn El. Ry. Co. (N. Y.), 26 N. E. 474. For construction of acts requiring consent of municipal authorities as condition precedent to the laying out and the construction of street railways, see People v. Bernard, 48 Hun, 57.

[1] In Heiskell v. Chicasaw Lodges, 87 Tenn. 668, an act of the Tennessee legislature had authorized the Grand Lodge I. O. O. F. to establish subordinate lodges and provided that such lodges might hold title to property. The act was held not to delegate power to create corporations and that such lodges did not become corporations. But in the same state branch banks established by parent banks under acts of the General Assembly were recognized by the courts as corporations. McNeil v. Wyatt, 3 Humph. 127; Bank of Tenn. v. Burke, 1 Coldw. 625. The power committed to the courts of Georgia to grant corporate powers to private companies is not judicial but legislative. Gaslight Co. v. West, 78 Ga. 318.

§ 34. Incorporation under general laws.—Nearly every state in the Union now provides for the formation of corporations under general law. The right to enact general laws on the subject is often given the legislature even where the power to grant special charters is also given in state constitutions. In all these states, a compliance with such general provisions by signing, acknowledging, and filing articles of association or incorporation and performing other prescribed acts constitutes the incorporators a body corporate.[1]

These laws extend the right to incorporate to all persons who accept their provisions and comply with their conditions, and no further acceptance by the members or recognition by the state is necessary. A corporation is not created by merely signing and acknowledging articles of incorporation. It is necessary that the subscribers acknowledge the same in due form, and cause the certificate of incorporation to be recorded. A preliminary organization usually precedes the filing of articles, and this dispenses with the necessity of formal acceptance by the incorporators, and the certificate of the Secretary of State, or other officer, furnishes ample evidence of the sovereign recognition of corporate existence. The articles and the certificate correspond with and take the place of charters granted by special act

[1] Indianapolis F. & M. Co. v. Herkimer, 46 Ind. 142. The directors named therein for the first year incur no liability as such prior to the filing of the charter, St. L. Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 606; 15 P. 544. As to liability of subscriber for special stock as partner in case of failure to file the articles with proper officer see Granby M. & S. Co. v. Richards, 95 Mo. 106; 8 S. W. 246, holding that no such liability is incurred and that advantage of such omission can be taken only by the state. A failure to acknowledge the articles is a fatal defect and does not estop one of the incorporators though the certificate of the Secretary of State recites that the articles were duly acknowledged. Doyle v. Mizner, 42 Mich. 332. It is not necessary that the acknowledgment of articles of incorporation should show that the persons accepting were personally known to the acknowledging officer to be the persons who executed the articles. People v. Cheesman, 7 Colo. 376; 3 P. 716.

and formally accepted by the members.[1] Taken together they may without any violation of propriety be designated as the charter. The construction of articles of incorporation executed under general laws is within the exclusive province of the courts, and the same general rules of interpretation apply to them as to other written instruments.[2]

§ 35. **What the Articles should contain.**—The statements which the articles must contain are usually prescribed by the general law as well as are the duties of state and county officers upon the filing of articles.[3] It may be generally stated that all the statutory requirements in regard to what the articles must contain and other acts to set the institution on its feet as a corporation, must be substantially complied with, and an entire

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[1] S. V. W. W. v. S. F. 22 Cal. 434. The grant of a charter by legislative act to persons named as incorporators does not of itself create a corporate body. It must be shown either by the act itself or by other proof that the corporators applied for the charter or afterwards accepted it, and an acceptance must be shown to have taken place within the state granting the charter. Smith v. Silver Valley Min. Co., 64 Md. 85; 20 A. 1032.

[2] Explanation of Terms. The word charter is often used in this treatise indiscriminately to describe special acts of incorporation and articles of incorporation under general law. The word director is used to denote a member of the managing board of a corporation whether such board is designated in the charter by that title or by that of trustee, curator or otherwise. So the word stockholder, shareholder and member are often employed interchangeably. Likewise the words constating instruments when used are to be understood to include not only the charter or articles of incorporation but such constitution, by-laws and rules and regulations of a permanent character, as the members of the corporation may have adopted.

[3] The statements required by the California statute, Civ. Code, Sec. 290, which may be taken as a fair illustration are as follows :—1. The name of the incorporation; 2. The purpose for which it is formed; 3. The place where its principal business is to be transacted; 4. The term for which it is to exist not exceeding fifty years; 5. The number of its directors or trustees which shall not be less than five nor more than eleven and the names and residences of those who are appointed for the first year; 6. The amount of its capital stock, and the number of shares into which it is divided; 7. If there is capital stock the amount actually subscribed and by whom. In addition to these other statements are often required to be contained in articles incorporating certain classes of corporations. These generally relate to the advance payment of a certain percentage of the capital stock, etc.

omission of any of them will be fatal to the legal existence of the organization as a corporation, when attacked on *quo warranto* or whatever method of sovereign attack is provided in a given state.[1] But where the steps taken to organize a corporation have been ineffective to give it corporate capacity, an act of the legislature, authorizing reincorporation of "any existing corporation, association or society * * * incorporated under the laws of this state" was held to authorize reincorporation of such defective organization.[2]

§ 36. Reorganization, reincorporation and amendment of Articles.—In most states where corporations may be formed under general laws, are found in addition provisions for reorganizing corporations which have from any cause abandoned the enterprises to prosecute which they were originally formed, or where their terms of existence have expired, and in others authority for doing so may be given by special act.[3] The same result is accomplished where power is given to re-incorporate, or, which is the equivalent, thereto filing amended articles. Amended articles must be executed with the same formalities and are subject to the same construction and tests as to their validity as original articles.

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[1] People v. Selfridge, 52 Cal. 331; Mokelumne Hill Mfg. Co. v. Woodbury, 14 Cal. 424; Harris v. McGregor, 29 Id. 124; Bigelow v. Gregory, 73 Ill. 197. See also, McIntire v. McLain Ditching Co., 40 Ind. 104; Hunt v. Salisbury, 55 Mo. 310; Indianapolis Furnace Co. v. Herkimer, 46 Ind. 142; Reed v. Richmond St. R. R. Co., 50 Ind. 342; Field & Co. v. Cooks, 16 La. Ann. 153; Utley v. Union Tool Co., 11 Gray, 139; Doyle v. Mizner, 42 Mich. 332; 3 N. W. 968; Richmond Factory v. Alexander, 61 Me. 351; Abbot v. Omaha, Smelting Co. 4 Neb. 416; Unity Ins. Co. v. Crane, 43 N. H. 641; Harrod v. Hamer, 32 Wis. 162.

[2] State v. Steele, (Minn.) 34 N. W. 903.

[3] An act providing for an extension of terms of existence of corporations beyond the term originally limited by their charters is not unconstitutional where corporations can only be created under general laws although the provisions of such act extend only to a specified class of corporations. Seneca Min. Co. v. Secretary of State (Mich.), 47 N. W. 25. Where a town company was created by special act of the territorial legislature of Kansas which took effect in 1857, and which contained no provision as to the period during which the company

However brought into being, the new institution is distinct from the original and possesses only such powers as are conferred by the new proceeding, in connection with the general laws, governing the class into which it falls.[1] If the reorganization or reincorporation proceed under a special act conferring additional powers to those enjoyed by its predecessor, it takes the same subject to the same construction as in the case of the creation of any other corporation by special charter.[2]

§ 37. Stricter compliance with general law required than with provisons of special charter.—Where a general law

was to exist, its existence was limited to 10 years, by the general corporation law, (Laws Kan. 1855, P. 185,) and a deed made by it thereafter is void, and not admissible as evidence of title in the grantee therein. Marysville Investment Co. v. Munson, (Kan.) 24 P. 977. Where a statute provides that a corporation shall not exist to exceed 20 years but the articles of incorporation provide for an existence of fifty years they are valid for 20 years' existence, People v. Cheesman, 7 Col. 376; 3 P. 716. Section 1041, Code Miss. provides that all corporations, after their charters have expired or been annulled, shall nevertheless be continued bodies corporate for three years thereafter for the purpose of suing and being sued and closing up their business. It was held that, where a railroad company's franchise was sold with the rest of the property on a decree of foreclosure, and the purchasers organized a new corporation under an act of the legislature, the old corporation ceased to exist at the end of three years thereafter. Ford v. Delta & Pine Land Co., 43 F. 181. And in another case it was held that an ordinance granting to a gas company, its successors, and assigns, the right of supplying gas to the city and to private consumers for a stated period, is not void because the time extends beyond the limit of the company's chartered existence, the ordinance providing that it might transfer all of its rights, privileges, property, and franchises conferred by the ordinance to any organized gas company of the state, which should within 20 days after the transfer file its written acceptance of the ordinance and give bond to perform all the agreements required of the original company. BARCLAY, J., dissenting; State v. Laclede Gas-Light Co., (Mo.) 14 S. W. 974.

[1] Day v. Mill Owners West F. Ins. Co., 75 Ia. 694; 38 N. W. 113. See Att'y-Gen. v. Perkins, 73 Mich. 303; 41 N. W. 426, holding also that an act extending period of corporate existence, is not in conflict with constitutional provision that private corporations shall not be created by special act. See also Dester v. Ross (Mich.), 48 N. W. 530.

[2] People v. Cook, 110 N. Y. 433; 18 N. E. 113; State v. Butler, 2 Pick. (Tenn.) 614; 8 S. W. 586. But where before the expiration of period for which a national bank was chartered, its term of existence was extended by act of Congress, it was held that the identity of the old corporation was in no wise affected, and that it simply had a new lease of life. Nat. Exch. Bk. v. Gay, 57 Conn. 224; 17 A. 555. See also Day v. Ins. Co., 75 Ia. 694; 38 N. W. 113.

provides that persons may become a body politic and corporate upon complying with the provisions of the law such as that before any such corporation shall commence business its articles of association shall be published in a certain way, and a certificate of the purposes of the organization shall be filed in certain public offices, the performance of these acts is a necessary prerequisite to corporate existence. In this respect there is a manifest difference as to the effect of irregularities and omissions of the requirements of the law in the organization of corporations, between those created by special charter, where there have been acts of user, and the case of individuals seeking to form themselves into a corporation under a general law. In the latter case, it is only in pursuance of the provisions of the statute for such purposes, that corporate existence can be acquired, and a stricter compliance with the statutory provisions is necessary in order to shield such individuals from personal liability.[1]

The articles should by apt reference or clear purport, show in what class of corporations provided for in the general law they seek corporate authority, setting forth explicitly the objects to be accomplished, and pointing out the manner of accomplishing them.[2]

[1] Sometimes a reorganizing law defines the powers of the new corporation to be such as were exercised by that which it succeeds. See Gas L. Co. v. Green, 46 N. J. Eq. 118. Protesting stockholders will not be bound by any arrangements affecting the interests in the corporate property unless there is legal authority for such reorganization and strict compliance therewith. Dutenhoffer v. Adirondack, etc., R. Co., 14 N. Y. S. 558.

[2] The charter of a private corporation is not void where the petition for a charter states the name and by it the purposes and objects of the association, and shows in connection with the order granting it that the charter was sufficient. Van Pelt v. Home Building & Loan Ass'n, 79 Ga. 349; 4 S. E. 501. For construction of articles filed under Territorial law in connection with statute U. S. Sec. 1889, see Carver Mercantile Co. v. Hulme, 7 Mont. 566; 19 P. 213. Under the provisions of a law requiring the certificate to state the manner of carrying on the business of the association, a statement merely that the manner of carrying on the business shall be such as the association may from time to time prescribe by rules and regulations was adjudged insufficient. State v. Central Ohio Relief Ass'n, 39 Ohio St. 399. A certificate of incorporation which

But a strict compliance in matters of detail is not essential and the proceeding will not be held invalid for slight defects or omissions.[1]

§ 38. Such general law, the measure of authority.—Under general laws providing for what purposes corporations may be formed, no persons by merely going through the formality of filing articles of incorporation, acquire any corporate powers not authorized by such general

provides that the corporate affairs shall be controlled by its president, vice president and attorney instead of providing for a board of directors or trustees, held insufficient to create a corporation *de jure*. Bates v. Wilson (Colo.), 24 P. 99.

[1] S. V. Water Works v. San Francisco, 22 Cal. 434; Ex parte S. V. W. W., 17 Id. 132; People v. Stockton, etc., R. R. Co., 45 Id. 306; Eastern Plank Road Co. v. Vaughan, 14 N. Y. 543; Roman Catholic Orphan Asylum v. Abrams, 49 Cal. 455; Eakright v. Logansport R. Co., 13 Ind. 404; Wallworth v. Brackett, 98 Mass. 98; Rogers v. Danvers, etc., Society, 19 Vt. 187; Walton v. Riley, 85 Ky. 413; 3 S. W. 605. Where the certificate stated that San Francisco was the place of business instead of "the principal place of business" it was held not sufficient variance from the requirement of the statute to render the proceedings void; Ex parte Spr. V. W. W., 17 Cal. 132. Where a statute authorized all "moral, beneficial, literary, or scientific associations by such methods as their rules or regulations may direct to appoint or elect any number not less than three nor more than nine trustees to take charge of the estate property belonging thereto," etc., and that "upon the appointment or election of such trustees or directors, a certificate of such appointment shall be executed by the person or persons making the appointment, or the judges holding the election, stating the names of the trustees or directors; the name by which said trustees shall thereafter forever be called and known shall be particularly mentioned and specified, etc.," it was held the statute did not require the rules and regulations adopted by the society to be set forth in the certificate. Roman Catholic Orphan Asylum v. Abrams, 49 Cal. 455. As to different requirements for benevolent, social, etc., associations and manufacturing corporations and construction of same, see Edgarton Tobacco Mfg. Co. v. Croft, 69 Wis. 256; 34 N. W. 143. Where statute requires articles to be signed by nine persons, signatures of less number not sufficient, State v. Critchett, 37 Minn. 13; 32 N. W. 787. Under statute requiring articles to be recorded filing for record in proper office sufficient. Heald v. Owen, 79 Iowa, 23; 44 N. W. 210; Walton v. Riley, 85 Ky. 413; compare Childs v. Hurd, 32 W. Va. 66; 9 S. E. 362. Same ruling with respect to failure to file a certified copy of certificate, Vanneman v. Young, (N. J.) 20 A. 53; In re Shakopee I. & B. Works v. Cole, 37 Minn. 91; 33 N. W. 319; Portland & C. Tp. Co. v. Bobb, (Ky.) 10 S. W. 794; Granby Min. & Smelting Co. v. Richards, 95 Mo. 106; 8 S. W. 246; contra, Ricker v. Larkin, 27 Ill. App. 625. Failure of probate judge to certify on the "completion of organization" that corporators are organized under the law and are authorized to do business does not invalidate. Sparks v. Woodstock Iron & Steel Co., 87 Ala. 294; 6 So. 195.

laws.[1] And if in their articles they assume to derive the right to engage in the prosecution of business or the accomplishment of purposes not warranted in such general law, the state officer, whose duty it is to receive and place on file articles of incorporation and issue a certificate, may refuse to give recognition to the same; nor can he be compelled to do so by writ of *mandamus*.[2]

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[1] State v. Atchison & N. R. Co. (Neb.), 38 N. W. 43. See also Smith v. Berndt, 1 N. Y. S. 108; Wood v. Odessa W. W. Co., 42 Ch. Div. 636.

But a foreign corporation need not show authority in its charter to hold land in the state where it does business, such right being determined by the laws of the latter. Tarpey v. Deseret Salt Co. (Utah), 17 P. 631; nor does the fact that an alien owns stock in a corporation which has acquired title to real estate disturb its title. Princeton Min. Co. v. First National Bank, 7 Mont. 530; 19 P. 210. A statute giving power to borrow money to the extent of one half par value of capital stock means the par value of the paid up capital only and not half of the authorized capital. Appeal of Lehigh Ave. Ry. Co. (Pa.), 24 N. E. 530. The development of natural gas is an object for which corporations may be organized under statute authorizing their formation to engage in "any work or works public or private which may tend or be designed to improve, increase, facilitate or develop trade." Carothers v. Phila. Co., 118 Pa. St. 468; 12 A. 314.

Under the New Jersey act to authorize the formation of railroad corporations and regulate the same, approved April 2, 1873, (Revision, 925,) and its supplements, a railroad less than a mile in length may be built, and an independent company may be organized to build a railroad which will connect two existing railroads. National Docks & N. J. J. C. Ry. Co. v. State, (N. J.) 21 A. 570. For construction of articles purporting to convey corporate authority under various statutes, see Appeal of Scranton Elec. Light & Heat Co., 122 Pa. 154; 15 A. 446; Nat. Bank v. Tex. Ins. Co., 74 Tex. 421; 12 S. W. 101; Brown v. Corbin, 40 Minn. 508; 42 N. W. 481; State v. Minn. T. Mfg. Co., 40 Minn. 213; 41 N. W. 1020; In re N. Fifth St. Mut. L. Ass'n, 8 Pa. Co. Ct. Rep. 17. For valuable review of the N. Y. Mfg. Corp. Act 1848, and Business Corp. Act 1875, as amended extended and modified to Apr., 1890, see 7 Ry. & Corp. L. Jour. 480. Decisions on such corporations collected 27 American and English Corp. Cas. 307 n.

[2] Isle Royale Land Corp. v. Sec. of State, (Mich.) 26 Am. & Eng. Corp. Cas. 34, holding that a corporation formed for "buying and selling and dealing in real estate, live stock, bonds, securities and other properties of all kinds on its own account and for commissions" may be incorporated under a statute which provides that a corporation may be created for the purposes therein enumerated and "for any other purpose intended for mutual profit or benefit not otherwise specially provided for" and consistent with the constitution and laws of the state. Nat. Bank v. Texas Investment Co., (Tex.) 12 S. W. R. 101. See also Brown v. Corbin, 40 Minn. 508. If the incorporation be lawful under one statute it will be lawful though another statute be referred to in the articles. State v. Minn., etc., Co., 40 Minn. 213. A stock association may be incorporated under the Texas statute for the purposes of giving mutual protection to its members against theft

§ 39. **Performance of conditions precedent.**—The performance of prescribed acts are often made conditions precedent to the transaction of business by certain classes of corporations. The classes upon which these conditions are imposed are usually such as do business of a public nature, and which both in the sale of the stock and the transaction of business after incorporation, invite the confidence of many persons who have no means of knowing or ascertaining the extent of their trustworthiness.

It is apparent that if in any such case a corporate existence prior to a compliance with the preliminary requirements to the extent of legalizing any business transaction could be successfully claimed it would defeat entirely the intent and object of the law. Therefore it is well settled that all conditions precedent imposed by the express terms of the law, must be complied with, before the assumption of corporate functions.[1]

and ferreting out crime. Guadaloupe & S. A. R. Stock Ass'n v. West, 70 Tex. 391; 7 S. W. 817. It was held that the General Railroad Act of New York of 1850, and its amendatory and supplementary acts, do not authorize a company organized thereunder to build an elevated railway through the streets of a city. Following Rapid Transit Co. v. Dash, 26 N. E. 25; Schaper v. Brooklyn & L. I. Ry. Co., (N. Y.) 26 N. E. 311.

[1] An act provided that the capital stock of a banking company should be $50,000 that no increase of such stock should be made unless the amount thereof should be paid in; and that before the corporation began business the stockholders should pay in full the several amounts subscribed; and that the act should become void unless the corporation should organize and proceed to business within two years. It was held that a failure to subscribe and pay in $50,000 in two years forfeited the charter. People v. Nat. Sav. Bank, 129 Ill. 618; 22 N. E. Rep. 288. Under the Alabama statute construed in connection with the state constitution, it was held no essential that the written declaration of the incorporators should provide that the unpaid portion of the capital be secured to be paid in fixed installments. Rolling v. Le Grand, 87 Ala. 482; 6 So. 332. Obtaining subscriptions for all the capital stock held not a prerequisite to the right to begin business under Kansas general laws. Chicago K. & W. R. Co. v. Commrs., 36 Kan. 121; 12 P. 593. See also Johnson v. Kessler, 76 Ia. 411; 41 N. W. 57; Earnest v. W. W. Co., 39 La. Am. 550; 2 So. 415; State v. R. R Co., 24 Neb. 143; Appeal of Scranton Electric L. & H. Co., 122 Pa. St. 154; 15 A. 446; State v. Canal Co., 40 Kan. 96; 19 P. 349; N. Y. Cable Co. v. New York, 104 N. Y. 1; 10 N. E. 332, where the condition precedent was obtaining

§ 40. No common law conditions.—But there are no common law conditions other than a complete organization by the preliminary meeting and election of officers. It was held that a railroad company was authorized to begin business before any of its capital stock was subscribed, where there was no requirement on the subject in its charter.[1]

§ 41. Conditions precedent and subsequent requirements distinguished.—A distinction must be kept in view between conditions which must be complied with before assuming to act as a corporation, and those which constitute merely a prerequisite to the right to transact business as a corporation, after it has been formed.

In the first case there is no corporate body in existence which the law recognizes until by a compliance with the statute the organization is complete. In the second case though there is a corporate body complete in its organization, yet it has no authority of law to exercise its function as such until it has acquired it by virtue of compliance with the conditions of law.[2] But it seems that the mere filing of a copy of the articles with another officer after the original has been properly filed with its proper custodian is not a condition pre-

consent of property owners for construction of the road. Elizabeth Gas L. Co. v. Green, 46 N. J. Eq. 118, holding only the state can object to failure to pay preliminary capital stock required by law.

1 Johnson v. Kessler, 76 Ia. 411. See also Earnest v. Water Works Co., 39 La. Ann. 550; State v. Railroad Co., 24 Neb. 143; Appeal of Scranton Electric Light and Heat Co., 122 Pa. St. 154; State v. Canal Co., 40 Kan. 96. Where a proportion of the capital stock is required to be subscribed before commencing, business, it is no legal objection that certificates for the same were not issued. State v. Butler, 2 Pick. (Tenn.) 614; 8 S. W, 586. A charter of a turnpike company which authorized an organization when "$200 to any one mile" are subscribed, is substantially complied with by a subscription of $200 without designating any particular mile of road to which it shall be applied. Fitch v. Popular Flat I. R. & S. L. Tp. Co. (Ky.), 13 S. W. 791.

2 Where the statute required that before a corporation can do any business, it shall record in a certain county the certificate of its incorporation, this was held to be a condition precedent to corporate existence. Childs v. Hurd, 32 W. Va. 66; 9 S. E. 362.

cedent to corporate existence, but merely a condition precedent to the right to transact business.[1]

§ 42. Conditions precedent prescribed on grounds of public policy.—The case is different where from reasons of public policy, or for the better protection and security of persons dealing with them, prescribed acts are required by statute to be performed by companies proposing to do business of a public character. For instance, insurance companies are often required to provide guarantee funds and furnish a certificate of capital stock; and railroad companies to obtain a percentage of the subscribed capital stock in cash, before doing business as a corporation. These may be considered corporations in a certain sense, before compliance with the requirements, but they are not insurance corporations in the one nor railroad corporations in the other case, with legal capacity to do business as such until the prescribed acts are performed.[2]

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[1] Harrod v. Hamer, 32 Wis. 162. A corporation was held to be organized under the law and authorized to do business where it had taken all proper steps required by statute, although the probate judge who had been requested so to do, had not issued the certificate of incorporation required by the statute. Sparks v. Woodstock Iron & Steel Co., 87 Ala. 294; and a similar view was taken where after original articles had been filed with the county clerk, a copy had not, as required by statute, been filed with the Secretary of State, within three months. Portland & G. Turnpike Co. v. Bobb, (Ky.) 10 S. W. 794. See also Guadaloupe & S. A. R. Ass'n v. West, 70 Tex. 391; Van Pelt v. Association, 79 Ga. 439; Edwards v. Denver & R. G. R. Co. (Colo.), 21 Pac. Rep. 1011. In Walton v. Riley, 85 Ky. 413; 3 S. W. 605, it was in view of the facts that under Gen. St. Ky. C. 56, a corporation is allowed to commence business as soon as its articles are filed in the county clerk's office; that the legality of the incorporation is required to be presumed; that neither the corporators themselves nor those sued by the corporation are allowed to deny it; and that the franchise can only be annulled by direct proceedings, *held*, that the failure of a turnpike company to file articles in the office of the Secretary of State within three months after filing them in the county clerk's office, as required, would not invalidate its organization, so as to effect the validity of a tax voted for building a turnpike, although section 6 of the act provides that the acts of corporations shall be valid if the required copy of the articles is filed in the office of the secretary of state within three months.

[2] In People v. Chambers, 42 Cal. 201, which was a *quo warranto* proceeding, the defendants were charged with usurping the functions of a railroad company

The National Bank Act provides that no banking association "shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the controller of the currency, to commence the business of banking."[1]

§ 43. **The State alone can object.**—The neglect of duties enjoined upon the corporation after it is organized, does not put an end to its existence;[2] nor does the fact that it has violated its charter so as to authorize a judgment of forfeiture on *quo warranto*, as where after incorporation, it has commenced business before compliance with conditions precedent to the transaction of

under the name of the "Oroville and Virginia City Railroad Company" without having been duly and properly incorporated as such. It was set up in the answer and was found by the court, that ten per cent of the whole amount subscribed, and which the statute required to be paid in cash amounted to the sum of eleven thousand dollars; and that ten thousand and nine hundred dollars of this amount had been paid in a check, drawn by one of the incorporators upon a bank where he usually kept a large balance but where at the time of the drawing it he had none. The check was never in fact, presented by the company at the bank for payment, though it had been received from the drawer and treated as cash. It was held that this was not such compliance as to entitle the company to recognition as a railroad corporation. See also People v. Rennselaer Ins. Co., 38 Barb. 323; Eaton v. Aspinwall, 19 N. Y. 119; People v. Troy House Company, 44 Barb. 634; Haviland v. Chase, 39 Barb. 283; Taggart v. Western Md. Railroad Company, 24 Md. 588; Patterson v. Arnold, 45 Pa. St. 415; People v. Stockton & Visalia R. R. Co., 45 Cal. 306. But under an act of incorporation of a railroad company, the first section of which declared the incorporators to be "a body politic and corporate" and in a subsequent section, it was enacted "that when $100,000 shall have been subscribed and $1 on each share shall have been paid in, the said company may organize and proceed to work;" it was held that this requirement was sufficiently complied with when $100,000 were subscribed and a sum in gross paid in equal to $1 upon every share subscribed and that a failure to comply strictly with these requirements would not have affected the corporate existence, but would have been an irregularity only which could not defeat the right of the corporation to recover a stock subscription. A. & A. R. R. Co. v. Ezell, 14 S. C. 281. And it has been held that where a fee of one hundred dollars was required to be paid to the state before the corporation "shall be organized," such payment was not a condition precedent to the legal incorporation of the company. Hughesdale Mfg. Co. v. Vanner, 12 R. I. 491.

[1] Rev. Stat. U. S. Sec. 5136; Armstrong v. Second Nat. B'k, 38 F. 883.

[2] Charles River Bridge v. Warren Bridge, 7 Pick. 344, 371; Boise City Canal Co. v. Pinkham, 1 Idaho, n. s., 790; Lyons v. Orange, etc., R. R. Co., 32 Md. 18.

business imposed by law. In such cases the state alone can object in a proceeding instituted for that purpose.[1]

§ **44. Evidence of incorporation.**—The law of evidence is a sufficient guide to the means of proving corporate existence, which is established like other facts when such proof is required. The charter must be produced as the best evidence or its absence accounted for, in order to admit secondary evidence of its existence and contents.[2] But while, as we have seen, there can be no corporate existence as against the

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[1] In Mokelumne Hill Mining Co. v. Woodbury, 14 Cal. 424, the certificate had been filed in conformity with the requirements of the act with the county clerk of the proper county, but no duplicate had been filed in the office of the Secretary of State. The company had been doing business as a corporation for several years. The court, per Cope, J., said:—"There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter." See also Humphrey's v. Mooney, 5 Cal. 283; Hyde v. Doe, 4 Sawy. 133; Cross v. Pinckneyville Mill Co., 17 Ill. 54; contra, Indianapolis Furnace, etc., Co. v. Herkimer, 46 Ind. 142.

[2] Where the certificate of incorporation, and the record thereof, are destroyed by fire; parol proof is admissible to show compliance with the law in the organization of the company and to prove the contents of the certificate; and it is not necessary that such evidence should be so minute as to permit of the reproduction of the certificate in all its details. It is sufficient if it is so full as to show that the law was complied with. Rose Hill & E. R. Co. v. People, 115 Ill. 133; 3 N. E. 725.

In a verified petition by a railroad corporation to condemn lands, the corporate existence of the petitioners is sufficiently established by an allegation to that effect, and the burden of proof is on him who assails it to show its non-existence. In re New York, L. & W. R. Co., 99 N. Y. 12; 1 N. E. 27.

In an action on contract to recover the price of certain shares of stock in the M. Co. sold to the defendant, the fact that the defendant signed a memorandum setting forth that he had bought a certain number of shares in the M. Co. is an admission by him that there was an M. Co. that issued what were called by the parties shares of stock which the defendant bought. And, in the absence of evidence that the certificates offered by the plaintiff were not genuine, or were what were generally known and called shares of stock in the M. Co., or were not what was intended by the parties, the defendant is liable for the purchase money. Mann v. Williams, 143 Mass. 394; 9 N. E. 807.

state without proof of a charter in existence, or of facts from which the court will presume one to have existed at a previous period, yet in most cases, the question of rightful existence is only incidental to the main issue ; and in all such cases slight evidence only of corporate existence will be sufficient. In a suit between members of the same corporation, affecting corporate interests, the mere naming of the corporation as a party dispenses with all further proof on that point.[1] So where any person sues on claims founded on dealings with a corporation as such, he is estopped, except where such estoppel would operate fraudulently,[2] from denying that the corporation exists or had capacity to have such dealings as far as concerns those particular transactions.[3] In other words evidence

[1] Fresno Canal & Ir. Co. v. Warner, 72 Cal. 379; 14 P. 37. Where it is shown that there is a charter or a law under which a corporation with the powers assumed might lawfully be incorporated, and a colorable compliance therewith, as well as a user of the rights claimed thereunder, the existence of a corporation *de facto* is established. Stout v. Zulick, 48 N. J. L. 599; 7 A. 362. Acts incorporating held sufficient without producing charter, Com. v. Carrall, 145 Mass. 403; 14 N. E. 618; so production of articles without showing acts of incorporation. Tarpey v. Desert Salt Co. (Utah), 17 P. 631; Dolbear v. Am. Bell Telephone Co., 8 S. Ct. 778: proof of recognition in community where business was carried on and acting as a corporation, Lakeside Ditch Co. v. Crane, 80 Cal. 181; 22 P. 76. The corporate existence of a company sued as "The S. Fire Ins. Co. of W.," may be inferred from its having caused the policies sued on to be signed under that name by its president and secretary. Bon Acqua Imp. Co. v. Standard Fire Ins. Co. (W. Va.), 12 S. E. 771. But where the certificate of incorporation when produced is legally defective for want of conformity with the statutory requirements under which it purports to have been made, it cannot be used for proof of a corporation *in esse* McCallian v. Hibernia Sav. & Loan Soc., 70 Cal. 163; 12 P. 114. For presumption in favor of regularity of incorporation see Welch v. Importers & Traders' Nat. Bank, (N. Y.) 25 N. E. 269; In re Niagara Falls Paper Manuf'g Co., Id. The fact that the business of a lumber company is conducted by a president and secretary, raises no presumption of incorporation, Clark v. Jones, 87 Ala. 474; 6 So. 362.

[2] State v. N. J. Tel. Co. (N. J.), 8 A. 290.

[3] A presumption exists in favor of the regularity of proceedings to incorporate. Bank of Monroe v. Gifford, 72 Ia. 750; 32 N. W. 669; Wood v. Wiley Construction Co., 56 Conn. 87; 13 A. 137; Duggan v. Col. M. & I. Co., 11 Colo. 113; 17 P. 105. But courts will not presume legal incorporation in a state foreign to that under whose laws the corporation claims corporate existence. Compliance with such laws must be shown. Brown v. Dibble, 65 Mich. 502;

that the party recognized the corporate capacity to transact that particular business is sufficient.[1]

The court will take judicial notice of public acts conferring corporate powers; but organization of corporations created by private statute or by organization under general incorporation laws must be proven.[2] When the question of corporate existence has been properly put in issue, it is generally sufficient proof for the corporation to produce the charter and show user.[3] Generally, by statute the production of a certified copy of the copy required by law to be filed in a particular office is sufficient.[4] Under general incorporation laws, something more is required than the mere production of articles of incorporation. Either a compliance or attempted compliance with the laws governing the organization of the particular class of corporations to which it belongs must be shown in addition.[5]

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32 N. W 656. Where a corporation has been permitted to interplead, and has been substituted as defendant in the action, a supplemental complaint filed by plaintiff against it, which fails to state whether it is a foreign or domestic corporation, and, if the latter, the state or government by which it was incorporated, as required by Code Civil Proc. N. Y. § 1775, is fatally defective, and a demurrer to such complaint will be sustained. Chandler v. Erie Transfer Co., 13 N. Y. S. 573.

[1] Infra. Ch. III.

[2] Hays v. Northwestern Bank, 9 Gratt (Va.) 127; Stribling v. Bank of the Valley, 5 Rand. 132; Alderman, etc., v. Finley, 10 Ark. 423; Holloway v. Memphis, etc., R. R. Co., 23 Texas, 465; State v. Vincennes University, 5 Ind. 91; Anderson v. Kerns Draining Co., 14 Id. 199.

[3] Fire Dept. v. Kip, 10 Wend. (N. Y.) 266; McCune Min. Co. v. Adams, 35 Kan 193; 10 P. 468; Utica Ins Co. v. Tilmad, 1 Wend. (N. S.) 555; Meth. Epis. Church v. Pickett, 19 N. Y. 482; Society, etc., v. Young, 2 N. H. 310; Scarsburgh T. Co. v. Cutler, 6 Vt. 315; Sampson v. Bowdinham Mill Co., 36 Me. 78; Sauce v. Bingham, 39 Id. 35; Same v. Caldwell, 3 Wend. 296; Wilmington, etc., R. R. Co. v. Thompson, 7 Jones, N. C. 387.

[4] See Boston Tunnel Co. v. McKenzie, 67 Cal. 485; 8 P. 22. A copy of the organization and certificate of a national bank, duly certified by the comptroller of currency of the United States, and authenticated by his official seal, is sufficient evidence of its incorporate existence. Hanover Nat. Bank v. Johnson, (Ala) 8 So. 42.

[5] Mokelumne Hill Co. v. Woodbury, 14 Cal. 424; Patterson v. Arnold, 45 Pa. St. 410; Washington Mut. Ins. Co. v. Chamberlain, 16 Gray, 165. A certifi-

§ 45. **Of foreign corporation.**—Courts will not take judicial notice of acts of other states chartering corporations. These must be produced and put in evidence as other material facts.[1] Where the fact of legal organization of a foreign corporation is in issue, the production of a copy of the charter or articles of organization under general law of such foreign state properly certified by the Secretary of the State is sufficient evidence of such fact in the first instance.[2]

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cate authenticated by the state officer with whom a copy of articles are required to be filed and showing in its statements substantial conformity with the law is sufficient evidence of legal organization; and when such organization is once shown, no subsequent irregularity in its proceedings or non-user is admissible in evidence between the parties. Eagle Works v. Churchill, 2 Bosw. 166. A statute making a copy of the certificate properly certified presumptive evidence of what is therein stated does not exclude other evidence of incorporation. New York Car Oil Co. v. Richmond, 6 Bosw. 213. Certified copies of letters of incorporation are *primâ facie* evidence of such incorporation, under Code N. C. §§ 677–682, providing that letters of incorporation, certified by the clerk of the supreme court, shall be admissible in judicial proceedings, and be deemed *primâ facie* evidence of the organization of a company purporting thereby to be established. Marshall v. Macon County Sav. Bank, (N. C.) 13 S. E. 282. Evidence that a corporation is acting as such is *primâ facie* evidence of *de facto* existence. People v. Pharris, 49 Cal. 342; Oakland Gaslight Co. v. Dameron, 67 Cal. 663; 8 P. 595, and a contract by a corporation, in a name different from its true corporate name, may be enforced by either party, where there is no question of its identity. Hasselmen v. Japanese Development Co. (Ind.), 27 N. E. 318.

[1] Lewis v. Bank of Ky., 12 Ohio, 132; U. S. Bank v. Stearns, 15 Wend. 314; Savage Manuf. Co. v. Armstrong, 17 Me. 34; Marine, etc., Bank v. Jauncey, 1 Barb. 486.

[2] People v. Ah Sam, 41 Cal. 653; Pacific Guano Co. v. Mullen, 66 Ala. 582; State v. Carr, 5 N. H. 367; U. S. v. Johns, 1 Wash. C. C. 363; s. c. 4 Dallas, 412; Farmers, etc., Bank v. Troy City Bank, 1 Doug. (Mich.) 437; Stone v. State, 20 N. J. 401. Under Code Iowa, § 2717, providing that when the corporate capacity has been alleged generally, as authorized in section 2716, it shall not be sufficient to deny the corporate capacity in terms contradictory of the allegation, but the facts relied on shall be specifically stated; where duly authenticated articles of incorporation under the laws of another state tend to disprove the allegations of the answer in regard to plaintiff's incorporation they should be admitted as competent, though they do not contain all that is required in such articles in the courts of Iowa, such fact not being relied on in the answer. Warder, Bushnell & Glessner Co. v. Jack, (Iowa), 48 N. W. 729. A party relying upon a non-compliance of a foreign corporation in its organization with the laws of the state whence it claims corporate existence must set out the particular statute or statutes relied upon in order that the court may judge of the legal provisions. Carey v. Cincinnati, etc., R. R. Co., 5 Iowa, 357.

§ 46. Pleading and denying corporate existence.—In ordinary suits brought by or against a corporation, the question whether there is a corporation *de facto* is in issue; but the legality of the corporate existence usually is not.[1] An issue may be raised by a denial in proper form of the existence of any franchise or power whenever assumed as the foundation of a right.[2] But a general denial does not put in issue plaintiff's corporate character.[3] In ordinary

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[1] Such allegation is no part of the cause of action, and its absence in the complaint is not ground of demurrer for insufficiency. Adams v. Lamson Consolidated Store-service Co., 13 N. Y. S. 118.

[2] City of Zanesville v. Zanesville Gas L. Co. (Ohio), 23 N. E. 55.

[3] Herron v. Cole, 25 Neb. 692; 41 N. W. 765 Palmetto Lumber Co. v. Risley, 25 S. C. 309. In an action against certain persons who alleged in their answer generally that they were a corporation, it was held error to exclude the testimony of plaintiff that he did not know defendants to be a corporation, and did not deal with them as such, but that he was informed by one of them that they were a partnership, and in the belief that they were so dealt with them. Eaton v. Walker, 76 Mich. 579. Where a statute provides that no corporation now in existence or hereafter formed, shall maintain any action, etc., until it has filed copies of articles with certain officers, a demurrer to a complaint which does not set out compliance with the requirements of the statute in these respects will not be sustained. The non-compliance must be specially pleaded. South Yuba, etc., Co. v. Rosa, 80 Cal. 333; 22 P. 222; S. P. Ry. Co. v. Pursell, 77 Cal. 69; 18 P. 886; Tabor v. Mfg. Co., 11 Colo. 419; 18 P. 537; Malone v. Transp. Co., 77 Cal. 38; 18 P. 858; Rembert v. S. C. Ry. Co., 31 S. Car. 309; 9 S. E. 968. Plea of general issue admits plaintiff's corporate existence as well as its power to sue; Rockland Mt. D. etc. Co. v. Sewall, 78 Me. 167; 3 A. 181. A consolidated railroad company assigned a note given to one of the corporations merged in a consolidation. In a suit by the assignee, it was held that, in order to recover, the consolidated company must be alleged and shown to be the legally created successor of the corporation to whom the note was given. Brown v. Dibble, 65 Mich. 520. Failure to allege that a party is a corporation renders the complaint demurrable; Oesterreicher v. Sporting Times Pub. Co., 5 N. Y. Supp. 3. An allegation that a corporation is doing business in a certain state does not necessarily import that it was created by the laws of that state and was a citizen thereof, Brock v. N. W. Fuel Co., 130 U. S. 341. Failure to allege in the complaint that plaintiff is a corporation is ground for demurrer, although plaintiff is described in the title of the action as a company, and the complaint itself begins as follows: "The plaintiff above named a corporation organized under the laws of the state of New York, and doing business in New York City, by . . . . its attorney, complaining of the defendants, alleges," etc. Schillinger Fire Proof Cement & Asphalt Co. v. Arnott, 14 N. Y. S. 326 (May, 1891.) Following Society v. Anderson, 2 N. Y. Supp. 49; Oesterreicher v. Sporting Times Pub. Co., 5 N. Y. Supp. 2. As to what constitutes sufficient allegation of corporate existence see West v. Eureka Imp. Co., 40 Minn. 394; 42 N.

actions between private parties, the general principles of pleading determine the sufficency of allegations, and denials of corporate existence.[1] In a suit by a foreign

W. 87; Adams Expr. Co. v. Harris, 120 Ind. 73; 21 N. E. Rep. 340; Ontario State Bank v. Tibbitts, 80 Cal. 68; 22 P. 66; Columbia Bank v. Jackson, 4 N. Y. Supp. 433; Am. Bap. Home, etc., Soc. v. Foote, 52 Hun, 236. In the last case it was held sufficient if the complaint alleges that the corporation was created first under statutes of other states and that it was also incorporated under a specified chapter of the laws of New York, for a given year as the facts are stated from which a conclusion as to whether it is a foreign or domestic corporation must follow. For requisites of plea of failure to accept of statutory provisions see Bailey v. N. Y. Ry. Co., 1 N. Y. S. 304; following Astor v. Ry. Co., 1 N. Y. S. 174; Taendsticks-fabriks Aktiebolaget Vulcan v. Myers, 11 N. Y. S. 663. Estoppel by demurrer, Berkman v. Hudson Riv. W. S. Ry. Co., 35 Fed. R. 34.

[1] Plea that plaintiff is not a corporation authorized to maintain the action held to be a defense to the whole action and to devolve upon plaintiff the burden of proving its corporate existence. Johnson v. Hanover Nat. Bank, 88 Ala. 271. Averment of corporate existence necessary in every count of complaint. People v. Cent. Pac. R. Co., 83 Cal. 393; 23 P. 303; Same Plaintiff v. Several Other Defendants, Id. In Indiana it is held that the complaint must show by proper averment when the corporation was organized or under what law it was created. And this is not shown by an averment that the corporation was formed by the consolidation of two corporations in a certain year, it not being stated whether the constituent corporations were organized under general laws or special charters. Crawfordsville & Southwestern Turnpike Co. v. Fletcher, 104 Ind. 97; 2 N. E. 243. Where a defendant sued as a corporation filed the affidavit required by statute stating that it was not a corporation, and no evidence was adduced to the contrary, judgment was held properly entered for defendant. White v. Bellefontaine Lodge I. O. O. F., 30 Mo. App. 682. See also Rembert v. Ry. Co., 31 S. C. 309. Allegation that defendant is a private corporation, sufficient without stating by what authority it was incorporated; Houston W. W. Co. v. Kennedy, 70 Tex. 233; 8 S. W. 36; Texas & P. Ry. Co. v. Virginia Ranch, etc., Co. (Tex.) 7 S. W. 341; and it was held that where a party's name imports that it is a corporation the fact need not be alleged. Adams Express Co. v. Harris, 120 Ind. 73; 21 N. E. 340. When the complaint described the defendant by its full corporate name it was held to sufficiently appear that defendant was a corporation. Cincinnati H. & I. R. Co. v. McDougall, 108 Ind. 179; 8 N. E, 571. But a complaint which omitted to allege whether plaintiff was a foreign or domestic corporation or the state or county by or under whose laws it was created or any facts from which the court could determine the class to which it belonged held bad on demurrer. Nat. Temperance Soc., etc., v. Anderson, 17 N. Y. St. Rep. 389; 2 N. Y. S. 49. Plea that corporation had ceased to exist in law at the time the alleged cause of action arose held bad for not averring that corporation had wound up its business and ceased to exist in fact as well as in law. Miller's Admx. v. Newberg, etc. Co., 31 W. Va. 836; 8 S. E. 600. A corporation plaintiff need not allege that it was empowered by its charter to make the contract. St. P. L. Co. v. Dayton 37 Minn. 364; 34 N. W. 335. An answer stating that all the members of the corporation are non-residents and that all its business is done in another state does not set up a defense. Moxie N. Y. Co. v. Baumbach, 32 F. 205. As to what officers should verify pleading and what verification

corporation it must allege not only the proceedings of incorporation, but the statute of the state where it was incorporated, authorizing such incorporation.[1]

§ 47. **Issue of corporate existence, how raised.**—It is clear that in all cases where a party to a suit brought by a corporation is not stopped by having dealt with the corporation as such, in the transaction upon which the action is based, he may put in issue the corporate existence. There is no presumption in favor of existence of a private corporation, and in the absence of a statutory provision dispensing with it, or unless it is chartered by public act of the legislature, its existence must be alleged and proven as any other fact.[2] The issue cannot arise where a corporation is sued by its corporate name and enters its appearance. The one party by bringing the action against it as a corporation, and the other by entering its appearance as such is precluded from raising the question of corporate capacity to sue or to be sued.

Accordingly, the objection that there is no such corporate body cannot be interposed under a general

should contain, see Meton v. Isham Wagon Co. (N. Y.), 15 Civ. Proc. R. 259, Kelly v. Nom. Pub. Co., Id. 4 N. Y. S. 99. As to whether name imports a corporation should be left to judicial knowledge. St. Cecilia Academy v. Hardin, 78 Ga. 39; 3 S. E. 305. The following additional authorities may be consulted with profit on the question of pleading or denying corporate existence: Am. Bap., etc., Soc. v. Foote, 52 Hun, 307; Sanders v. Sioux City, etc., Co. (Utah), 24 P. 532; Columbia Bank v. Jackson, 4 N. Y. S. 433; Weeks v. G. S. G. M. Co., (Cal.) 15 P. 302 Ontario State Bank v. Tibbitts, 80 Cal. 68; Young v. Prov. & S. S. Co., 150 Mass. 550; Smyth v. Scott, 124 Ind. 183; 24 N. E. 685; Supreme Lodge A. O. U. W. v. Zulke, 30 Ill. App. 98; aff. S. C. 129 Ill. 298; 21 N. E. 789; Rothschild v. G. T. Ry. Co., 10 N. Y. S. 36; Ludowisky v. Polish, etc., Soc. 29, Mo. App. 337.

[1] Savage v. Russell & Co., 84 Ala. 103; 4 So. 235. But failure to file the articles of incorporation with the declaration where the proper allegations are made is not ground for plea in abatement. C. J. L. Meyer & Sons Co. v. Black, 4 N. M. 190; 16 P. 620.

[2] Rheem v. Nangatuck Wheel Co., 33 Pa. St. 358; Northumberland county Bank v. Eyer, 60 Pa. st. 436; Lehigh Bridge Co. v. Lehigh Coal, etc., Co., 4 Raw. (Pa.) 9; Brown v. Illius, 27 Conn. 84; School District v. Blaisdell, 6 N. H. 197; Methodist Church v. Wood, 5 Ohio, 283; Jones v. Bank of Tennessee, 8 B. Mon.

denial, but must be made at an earlier stage or by special plea according to the practice of the court where the suit is brought.

122; Whitington v. Farmers' Bank, 5 Har. & Johns, 489; Ætna Ins. Co. v. Peck, 28 Vt. 93; Savage Manuf. Co. v. Armstrong, 17 Me. 34; McIntire v. Preston, 5 Gilman, 48; Soc. v. Pawlet. 4 Pet. 480; Hardy v. Merriweather, 14 Ind. 202; Hargrave v. Bank of Illinois, 1 Breese, 84; Jones v. Cincinnati Type, etc., Co., 14 Ind. 89; Monumoi Gt. Beach v. Rogers, 1 Mass. 159; Orno v. Wedgewood, 4 Id. 49; Alderman, etc., v. Finley, 10 Ark. 443.

CHAPTER III.

LEGAL AUTHORITY PRESUMED FROM USER AND RECOGNITION.

§ 48. **Corporations de facto.**—The term *de facto* applied to an association of persons may either signify that they are assuming and acting as a corporation without legal authority or upon irregular and imperfect organization under it, or we may by use of the term mean such an association so acting without regard to their legal right to so act.

§ 49. **Distinguished from corporations de jure.**—By the term "corporation *de jure*" we describe an aggregate body of persons acting in a corporate capacity of legal right.[1] In order to determine more clearly the difference between corporations *de jure* and *de facto* it is necessary

[1] In a suit by a corporation where the principal issue is corporate existence, it is misleading and mystifying to use over and over again in the charge the expressions, "corporation *de jure*" and "corporation *de facto*." C. Aultman & Co. v. Connor, 25 Ill. App. 654.

to clearly understand the proceedings necessary to the legal formation of a corporation.

Familiar incidents of conditions precedent to the assumption of corporate powers are the requirements that there shall first be raised by subscription a certain amount of capital stock and that copies of articles of incorporation shall be filed with public officers.[1] Subscribers to the required capital stock in the one case are not bound as by express contract by their subscriptions; and signers of articles of association do not in any such case become actual members of the proposed corporation until the positive requirements in regard to filing articles are fulfilled.[2] The same rule applies to shareholders in the original companies when a consolidation of two or more companies is authorized and attempted. The forms prescribed by law must be observed or they are not bound by the attempted consolidation.[3]

§ 50. The common law prohibition considered.—Acts done in excess of the powers conferred by law upon legally existing corporations are prohibited by the

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[1] Coyote, etc., Mining Co. v. Ruble, 8 Oreg. 284; De Witt v. Hastings, 69 N. Y. 518. The fact, that a religious corporation had not, previously to the commencement of a suit, caused the papers and certificates required by chapter 3 of the Laws of New Mexico, 1880, to be filed in the office of the secretary of the territory, does not debar it from access to the courts in protecting its previously vested estate in the territory. Probst v. Trustees, etc., 3 N. M. 237; 5 P. 702.

The law requiring foreign corporations doing business in Montana to first file charter or act of incorporation declares the failure to do so to be willful negligence. The penalty therefor is not disqualification to do business, but simply relieves the party suing such corporation from the necessity of proving the incorporation except by reputation. King v. National M. & E. Co., 4 Mont.; 1 P. 727.

[2] There is a corporation *de facto* though not *de jure* where the articles are filed with the county clerk but not with the Secretary of State, as required by law. Grand River Br. Co. v. Rollins, 13 Colo. 4; 21 P. 897.

[3] Mansfield, etc., R. R. Co. v. Drinker, 30 Mich. 124; Peninsular Ry. Co. v. Thorp, 28 Mich. 506; Tuttle v. Mich. Air Line R. R. Co., 35 Mich. 247; Infra, § 92.

common law.[1] It necessarily follows that all the acts done by a body assuming to act as a corporation but which, in fact, has no legal existence as such, are likewise prohibited by the common law. But the rights and obligations between the parties to such prohibited contracts are matters independent and distinct from the powers of the corporation.[2] So with reference to the validity of transactions with a corporation without legal existence, the questions are different from that of the legal authority of either party to enter into it.

These are two in number. First: Did the *de facto* corporation do the act or make the contract in a corporate capacity or become chargeable with it on the principles of the law of agency? Second: Is the contract affected by the common law prohibition?

The organization assuming corporate functions without statutory authority has sometimes been treated by the courts as a nullity. But the ends of justice can be better promoted by recognizing the corporation like other existing facts, that is as a corporation, unlawful though it be, until by a direct proceeding its assumption of corporate capacity has been terminated.

§ 51. De facto existence must be shown.—But since nothing is plainer than that a contract cannot be made with a non-entity or a "nullity"; therefore the *de facto* corporation must be shown to have an existence at least to the extent of contracting.[3] But when it is once shown that an attempt has in good faith been made

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[1] Infra. § 763.

[2] Infra. § 765.

[3] Where a deed of trust and note were executed to the Bank of Tennessee after its charter had expired, and a judgment creditor of the grantor in the deed of trust sued to have the deed of trust set aside, the relief prayed for was granted on the ground that it appeared affirmatively and conclusively that the corporation did not exist for any purpose at the time of the execution of the note and deed of trust. White v. Campbell, 5 Humph. 38.

to organize a private corporation by colorable proceedings, approved by the attorney-general and the secretary of state, and the paper intended for the certificate of incorporation is admitted to record in the office of the latter, duly certified by him as the certificate of incorporation of such body, and where these steps are followed by uninterrupted and unchallenged user for a number of years, and valuable rights and interests have been in good faith acquired, enjoyed and disposed of by such organization, acting as a body corporate, it is a corporation *de facto* and its corporate capacity cannot be questioned in a private suit to which it is a party.

Such an organization has capacity to acquire, hold, enjoy, incumber, and convey the legal title to real estate; and rights acquired, or liabilities incurred, by it, and by parties dealing with it in good faith, will not be divested or defeated by a subsequent judgment in *quo warranto* proceeding excluding it from the use of corporate franchises by reason of some defect or omission in the original steps taken to assume corporate powers.[1]

§ 52. **How the law of agency connects itself with the question.**—The fact that entering into the contract or doing the act by the *de facto* corporation was an exercise of its assumed corporate capacity, being shown or presumed from the relations of the parties to the transaction or the form of the pleadings, it is chargeable subject to general laws in the same manner and to the same extent as corporations *de jure*. The principles of the law of agency are applicable alike to all corporations whether lawfully formed or not.

The scope of the powers of agents of a *de facto* corporation are determined by the same means as in corporations *de jure*.

[1] Society Perun v. Cleveland, 43 O.st. 481; 3 N. E. 357.

§ 53. **Powers of de facto corporations.**—The power of the majority of members is bounded and limited by the charter or articles and by-laws, if they have accepted or adopted any, as in corporations existing and acting under lawful authority. The customs, usages and methods of business governing individuals and *de jure* corporations engaged in like enterprises with the *de facto* corporation determine the fact and extent of liability for acts of their officers and agents. Persons assuming to act as a corporation may, in some cases, be chargeable as such, even though they have made no attempt to comply with the law governing the class of corporations to which they claim to belong; but generally there has been at least a colorable compliance. When the assumption of corporate authority is a naked and bald pretension, the presumption can only be indulged to avoid gross injustice, and on the principle of estoppel, which will be applied in these cases as in others, not to avoid but to prevent fraud. Where the ends of justice would be promoted by refusing to recognize the *de facto* claim of such an association courts will not hesitate to ignore it. In order to avail the persons so claiming, they will be required to show that they have acted in the utmost good faith. Even then they are not shielded from personal liability, except in those cases where a contractual relation has been assumed. In actions not founded upon contract made between the parties, the existence of the alleged corporation, if put in issue, must be proved; but when one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be heard to say that the corporation had no existence, and for that reason no contract was made.[1]

[1] Fresno Canal, etc., Co. v. Warner, 72 Cal. 379; Lehman v. Warner, 61 Ala. 455; Close v. Glenwood Cemetery, 107 U. S. 477; Oregonian Ry. Co. v. Oregon R. & N. Co., 10 Sawy. 470; Bigelow on Estoppel, 4th Ed. p. 527; Lakeside Ditch Co. v. Crane, 80 Cal. 181; First Bap. Church v. Branham, (Cal.) 27 P. 60.

§ 54. No de facto corporation without legal authority for the class to which it assumes to belong.—There can be no corporation *de facto* for any purpose in the absence of a law authorizing associated parties to file their articles of association or to become incorporated. Nor does the carrying on of business in a corporate name, under such circumstances, constitute evidence of user which can be considered in aid of legal corporate existence.[1]

But where it is shown that there is a charter or law under which a corporation with the powers assumed might lawfully be incorporated, and there is in good faith a colorable compliance with the requirements of the charter or law and a user of the rights claimed under the charter, the existence of a corporation is established.[2]

§ 55. Same rule applied to foreign and consolidated de facto corporations.—With respect to the regularity and legality of their organization in the sovereignty whence they claim corporate existence, foreign corporations are treated precisely as domestic in all proceedings growing out of their contracts and dealings.[3] And so are corporations formed by an attempted consolidation of two or more corporations.[4]

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[1] Eaton v. Walker, 76 Mich. 579; 43 N. W. 638. See also Doyle v. Mizner, 42 Mich. 332; 3 N. W. 968; Meth. Epis. U. Church v. Bickett, 19 N. Y. 482, 485; Heaston v. R. Co., 16 Ind. 275; Harriman v. Southam, 16 Ind. 190; U. S. Bank v. Stearns, 15 Wend. 314; Childs v. Smith, 55 Barb. 45.

[2] Stout v. Zulick, 48 N. J. L. 599; 7 A. 362; Payette v. Free Home, etc., Ass'n, 27 Ill. App. 307. A corporation having carried on business, and held itself out to the world as such before it was organized according to law, the assets thereof should be made liable for its debts, though created previously to the completion of such organization. Bergen v. Porpoise Fishing Co., 42 N. J. Eq. 397; 8 A. 523.

[3] Bank of Toledo v. International Bank, 21 N. Y. 542; Williams v. Cheney, 3 Gray, 215; Newburg Petroleum Co. v. Weare, 27 Ohio St. 354; Barrett v. Mead, 10 Allen, 337.

[4] Branch v. Jesup, 106 U. S. 468; 1 S. Ct. 495; Rachine, etc., R. R. Co. v. Farmers' L. & T. Co., 49 Ill. 347; Venable v. Ebenezer Baptist Church, 25 Kans. 177.

§ 56. A different rule where illegality or immorality appears in articles.—But if, in the purposes for which the *de facto* corporation was attempted to be organized, appear, on the face of the articles or charter under which it assumes corporate capacity, the taint of illegality or immorality, or a violation of a positive statutory prohibition, a member of such association will not be bound by his contract of membership, nor persons dealing with it by their recognition of corporate existence.

This rule applies whether the organization in pursuance of the reprehensible association was according to the formalities prescribed by law for the organization of corporations for lawful purposes or not.[1]

§ 57. Estoppel in the case of dealings with a de facto corporation.—Corporate capacity cannot be denied on the ground of illegal organization by those who have assumed contractual relations or had transactions with a corporation as such in an action growing out of such contracts or transactions. Neither party will be permitted in such cases to deny the legality of corporate existence.[2] All such objections, if valid, are only avail-

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[1] The following illustrations of the text are cited: An association incorporated to resist the enforcement of the law; Detroit Scheutzen Band v. Agitations Verein, 44 Mich. 313; 6 N. W. 675; to aid a rebellion against the government, Chicora Company v. Crews, 6 S. Car. 243; to violate any constitutional prohibition or statute of the state, St. Louis, etc., Assn. v. Hennessey, 11 Mo. App. 555. But see Importing, etc., Co. v. Locke, 50 Ala. 332; United States v. Insurance Companies, 22 Wall. 99, and the two following sections. Where individuals owning a grant from the Mexican government of lottery franchises and privileges organized a corporation under the public improvement law of Louisiana for the avowed purpose of constructing and developing various public improvements in Mexico, but for the real purpose of carrying on a lottery in that republic, and fixed the capital stock at $1,000,000, all of which was issued as fully paid up stock to subscribers who paid nothing therefor, it was held that as by the constitution of Louisiana the lottery business is prohibited, unless the privilege is granted by the state, as is also the issue of paid up stock without any payment in fact being made, the subscribers to the original stock acquired no interests which a court would protect. Lewarne v. Meyer, 38 Fed. Rep. 91.

[2] Weinman v. Wilkinsburg, etc., Ry. Co., 118 Pa. 192; 12 A. 288, estoppel of directors to deny constitutionality of act under which corporation organized;

able on behalf of the state.[1] Transfers of property, real or personal, by and to a corporation, stand upon the same footing as other transactions. Neither party can avoid them on the ground that the corporation was

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Granger's Bus. Ass'n v. Clark, 67 Cal. 634; 8 P. 445; Fresno Canal, etc., Co. v. Warner, 72 Cal. 379; 14 P. 37; Wentz v. Lowe, (Pa.) 3 A. 878; Stout v. Zulick, 48 N. J. L. 599; 7 A. 362; Minn. Gas. etc. Co. v. Denslow (Minn.), 48 N. W. 771; holding that persons who have dealt with *de facto* corporations cannot deny their corporate capacity for the purpose of holding shareholders to individual liability as partners; also that the principle applies as well to corporations formed under general laws as to those formed under a special charter; Mann v. Williams, 143 Mass. 394; 9 N. E. 807; Independent Order, etc., v. Paine, 122 Ill. 625; 14 N. E. 42; purchase of shares; Hamilton v. McLaughlin, 145 Mass. 20; 12 N. E. 424; acceptance of mortgage duly signed by officers of *de facto* corporation; Marshall Foundry Co. v. Killian, 99 N. C. 501; 6 S. E. 680; participation in organization and acting as president; Williams v. Stevens Pt. Lumber Co., 72 Wis. 487; 40 N. W. 154; estoppel of corporation to allege its lack of organization at time of purchase; Corey v. Morrill (Vt.), 17 A. 840; Demorest v. Flack, 11 N. Y. S. 83; to same effect; St. Paul Land Co. v. Dayton, 42 Minn. 73; 43 N. W. 782; Com. Bk. v. Pfeiffer, 108 N. Y. R. S. (N. Y.) 242; 15 N. E. 311; Scheuffler v. Gr. L. A. & N. W. (Minn.) 47 N. W. 799; Beekman v. Hudson River, etc., Ry. Co., 35 F. 3; estoppel of railroad company mortgagee from denying source of title; Bates v. Wilson, 14 Colo. 140; 24 P. 99, estoppel of director; Vanneman v. Young (N. J.), 20 A. 53; Stout v. Zulick, supra, estoppel of parties seeking to hold incorporators as partners when they have acted in good faith; People v. Board of Trustees 111, Ill. 171; principle applied in *mandamus* proceeding. A corporation bringing suit in a justice's court is not on appeal bound to prove its corporate existence in the appellate court if no objection was made by the defendant to its failure to do so on the trial in the court below. State v. N. Y. & N. J. Tel. Co., 51 N. J. L. 83; 16. A. 188. A corporation continuing to act as such after the expiration of the period of existence fixed in its articles held to be a *de facto* corporation to the extent of estopping one who had dealt with it as such; also that one who had taken part in its organization and acted as an officer and agent could not treat it as a copartnership and compel his fellow corporators to account to him on that basis. Bushnell v. Ont. Ice Mach. Co. (Ill. May, 1891), 27 N. E. 596.

[1] Rowland v. Meader Furniture Co., 38 Ohio St. 270; Gaff v. Flasher, 33 Ohio St. 107, 115, 453; St. Louis & S. C. & M. Co. v. Sandoval C. & M. Co., 111 Il. 32; North v. State, 107 Ind. 356; 8 N. E. 159; People v. Board of Trustees, 111 Ill. 171; Corey v. Morrill, 61 Vt. 598; 17 A. 840; Palmer v. Lawrence, 3 Sandf. 161; McFarlan v. Triton Ins. Co., 4 Denio (N. Y.) 392; West Winsted Savings Bank v. Ford, 27 Conn. 282; Town of Searcy v. Yarnell, 47 Ark. 269; 1 S. W. 319; Cravens v. Eagle Mills Co., 120; Ind. 6; 21 N. E. Rep. 981; School Dist. No. 61 v. Collins, (Dak.) 41 N. W. Rep. 464; McCord & Nave Mer. Co. v. Glen, (Utah) 21 Pac. Rep. 500; Winget v. Quincy Building & Homestead Ass'n, 128 Ill. 67; 21 N. E. 12; Booske v. Gulf Ice Co., 24 Fla. 550; 5 So. 247; McDonnell v. Ala. Gold L. Ins. Co., 85 Ala. 401; 5 So. Rep. 126; Nat. Com. Bank v. McDonnell (Ala.), 9 So. 149; Dorgan v. Same, Id.; Bush v. Same, Id.;

not formed under authority of law.[1] In suits against shareholders to enforce their liability on their subscription after insolvency, they will not be allowed to deny the validity either of their contracts of membership in the *de facto* corporation, or the contract between the latter and the creditor.[2]

McMillan v. Same, Id.; Worcester Institution v. Harding, 11 Cush. 285; Newburg Petroleum Co. v. Weare, 27 Ohio St. 354; Jones v. Kokomo Building Ass'n, 77 Ind. 340; Alexander v. Tolleston Club, 110 Ill. 65; City of St. Louis v. Shields, 62 Mo. 247; Grant v. Henry Clay Coal Co., 80 Pa. St. 208, 218; Butchers, etc., Bank v. McDonald, 130 Mass. 264; Town Hall Ass'n v. Chester, 55 Cal. 98; Golden Gate M. & M. Co. v. Joshua Hendry M. M., 82 Cal. 184; 23 P. 45. Principle of text applied to maker of promissory note. Oregonian Ry. Co. v. Oregon Ry. Co., etc., 22 Fed. Rep. 245, 249; s. c. 23 Fed. Rep. 232; Heaston v. Cincinnati, etc., R. R. Co., 16 Ind. 279. The rule applies as well to municipal as to private corporations. Douglass County v. Balles, 94 U. S. 104; County of Leavenworth v. Barnes, 94 U. S. 70; Camp v. Byrne, 41 Mo. 525; Smith v. County of Clark, 54 Mo. 58; Goodrich v. Reynolds, 31 Ill. 490; Mitchell v. Deeds, 49 Ill. 417. Applies to suits generally upon contracts with corporations *de facto*. Imboden v. Etowah, etc., Mining Co., 70 Ga. 86. To *de facto* corporations as well as to parties dealing with them. Caller v. Town of Cameron, 3 Dill. 198; Blackburn v. Selma, etc., R. R. Co., 2 Flipp. 525; Racine, etc., R. R. Co. v. Farmers' L. & T. Co., 49 Ill. 346; Dooley v. Cheshire Glass Co., 15 Gray, 494; Empire Manuf. Co. v. Stuart, 46 Mich. 482; 9 N. W. 527; Snider's Sons Co. v. Troy, (Ala.) 8 So. 658; Cory v. Lee, Id. 694; Stone v. Berkshire, etc., Soc., 14 Vt. 86; Rush v. Halcyon Steamboat Co., 84 N. Car. 702; Reynolds v. Meyers, 51 Vt. 444. Contra, Boyce v. Towsontown Station, etc., Church, 46 Md. 359.

[1] Cowell v. Springs, Co., 100 U. S. 55, 60; Broadwell v. Merritt (Mo.), 1 S. W. 855; Same v. Weller, Id. 857; Smith v. Sheeley, 12 Wall. 358; Close v. Glenwood Cemetery, 107 U. S. 466; 2 S. Ct. 267; Sword v. Wickersham, 29 Kans. 746; City of Denver v. Mullen, 7 Col. 345; 3 P. 693; Cahall v. Citizens' Mut. Building Ass'n, 61 Ala. 232; Baker v. Neff, 73 Ind. 68; Thompson v. Candor, 60 Ill. 244; Snyder v. Studebaker, 19 Ind. 462, overruling Harriman v. Southam, 16 Ind. 190; Case v. Benedict, 9 Cush. 540; but see Doyle v. Mizner, 42 Mich. 332; 3 N. W. 968; Dooley v. Wolcott, 4 Allen, 406; Morgan v. Donaron, 58 Ala. 255; Carey v. Cincinnati, etc., R. R. Co., 5 Iowa, 358; Nutting v. Hill, 71 Ga. 557. A creditor of a *de facto* corporation who had obtained a preference in the distribution of its assets was not permitted to deny its legal incorporation in a suit by a receiver to recover the undue proportion after insolvency. Rafferty v. Bank of Jersey City, 33 N. J. Law 368.

[2] Walworth v. Brackett, 98 Mass. 98; Bon Aqua Imp. Co. v. Standard F. Ins. Co. (W. Va.), 12 S. E. 771; Frost v. Walker, 60 Me. 468; Hager v. Cleveland, 36 Md. 476; Wheelock v. Kost, 77 Ill. 296; Automatic, etc., Co. v. N. A. Phon. Co., 45 F. 1; Aultman v. Waddle, 40 Kan. 195; 19 P. 730; National Com. Bank v. McDonnell (Ala.), 9 So. 149; Dorgan v. Same, Id.; Bush v. Same, Id.; McMillan v. Same, Id.; McHose v. Wheeler, 45 Pa. St. 32, 41; Minn. Gas Light Economizer Co. v. Denslow, (Minn.) 48 N. W. 771; Holyoke Bank v.

§ 58. Acts of acquiescence must be shown.—Esttoppel in the case of members seeking to deny liability to the corporation can only be predicated upon some act or acts of acquiescence.[1] A party may be estopped by acting as a director,[2] by paying calls,[3] attending meetings of stockholders,[4] by any other act indicating an acquiescence in the validity of his subscription. In such cases he cannot set up as a defense that a charter has been granted upon a condition precedent which has not been performed where the incorporators are found in the quiet possession and exercise of corporate rights and privileges,[5] or that the corporation had forfeited

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Goodman Paper Co., 9 Cush. 576; Beck v. Henderson, 76 Ga. 760; Central Agricultural, etc., Ass'n v. Alabama, etc., Ins. Co., 70 Ala. 120; Gaff v. Flesher, 33 Ohio St. 107. See Utley v. Union Tool Co., 11 Gray 139; Keyser v. Hitz, 2 Mackay (D. C.) 473. Where a subscription is made to the capital stock of a corporation in view of and for the purpose of a subsequent organization, which is actually had, and the subscriber pays in full for one share, and transfers other shares, he thereby recognizes and affirms his contract of subscription, and, upon a bill being filed by a creditor of the corporation, alleging its insolvency, and asking for the payment of the unpaid capital stock, such subscriber cannot set up as a defense that the corporation was not in existence at the time the contract of subscription was executed. Bell's Appeal, 115 Pa. 88; 8 A. 177.

[1] In Swortout v. Mich. Air Line R. R. Co., 28 Mich. 389, the Court say:—"Where there is a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporations,—it is plainly a dictate alike of justice and of public policy, that, in controversy between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, such questions should not be suffered to be raised."

[2] Home Stock Ins. Co. v. Sherwood, 72 Mo. 460; Stoops v. Greenburgh, etc., Co., 10 Ind. 47; Danbury & N. R. R. Co. v. Wilson, 22 Conn. 435; Evansville, etc., Co. v. Evansville, 15 Ind. 395; Meadow v. Gray, 30 Me. 547; Kishacoquillas, etc., Co. v. McConahy, 16 S. & R. 140.

[3] Central P. R. Co. v. Clements, 16 Mo. 359; Maltby v. Northwestern Va. R. Co., 16 Md. 422; Intermountain Pub. Co. v. Jack, 5 Mont. 568; 6 P. 20.

[4] Kansas City Hotel Co. v. Hunt, 57 Mo. 126.

[5] Tar River Nav. Co. v. Neal, 3 Hawks (N. C.) 520; see also Wilmington C. & R. R. R. Co. v. Thompson, 7 Jones' L. (N. C.) 387; Brookville & G. T. Co. v. McCarty, 8 Ind. 392; Bushnell v. Con. Jer-Mach. Co. (Ill.), 27 N. E. 5 69.

its charter for misuser and non-user.[1] After such acquiescence, it was held no defence that no certificate was filed,[2] or that the incorporation was obtained by false representations to Parliament,[3] or that only three of the five required had signed the certificate,[4] or that the corporation was organized on a fourteen days' notice, fifteen days' notice being required.[5] It seems to be well settled that a subscriber cannot set up that the charter[6] or the statute creating the corporation was unconstitutional;[7] though in a late case a contrary view is taken.[8]

§ 59. **Where not estopped.**—But where the contract of subscription was made previous to and in anticipation of incorporation, subsequent acts of acquiescence in the mode of incorporation do not estop the party from setting up the non-incorporation. The defect is a good defense to the action on a subscription so made.[9] Nor

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1 Central A. & M. Ass'n v. Alabama G. L. Ins. Co., 70 Ala. 120. In this case the Court say:—" Whoever contracts with a corporation having a *de facto* existence, the reputation of a legal corporation in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into irregularities attending its formation, to defeat the contract, or to avoid the liability he has voluntarily and deliberately incurred." See Appleton Mut. Fire Ins. Co. v. Jesser, 87 Mass. 446; McCarty v. Lavasche, 89 Ill. 270.

2 Tarball v. Page, 24 Ill. 48. See also Wallworth v. Brackett, 98 Mass. 98; Hanover J. & S. R. R. Co. v. Haldeman, 82 Pa. St. 36; Rowland v. Meader Furniture Co., 38 O. St. 269; Central A. & M. Ass'n v. Alabama G. L. Ins. Co., 70 Ala. 120.

3 Crawford R. R. R. Co. v. Lacey, 3 Y. & J. 80.

4 Monroe v. Fort W. J. & S. R. R. Co., 28 Mich. 272.

5 Ossipee, etc., Co. v. Canney, 54 N. H. 295.

6 Dows v. Napier, 91 Ill. 44.

7 St. Louis Ass'n v. Hennessey, 11 Mo. App. 555; Slocum v. Prov. S. & G. P. Co., 10 R. I. 112; McHose v. Wheeler, 45 Pa. St. 32; Tarbell v. Page, 24 Ill. 48.

8 Eaton v. Walker, 76 Mich. 579; 42 N. W. 638.

9 Schloss v. Mont. Tr. Co., 87 Ala. 411; Taggart v. Western Maryland R. R. Co., 24 Md. 563. See also Dorris v. Sweeney, 60 N. Y. 463; Rickoff v. Browne R. S. S. M. Co., 68 Ind. 388; Indianapolis F. and Min. Co. v. Herkimer, 46 Ind. 142; Nelson v. Blakey, 47 Ind. 38; McIntire v. McLane D. Ass'n, 40 Ind. 104; Richmond Factory Ass'n v. Clarke, 61 Me. 351; Reed v. Richmond St. R. R. Co., 50 Ind. 342.

does the principle of estoppel apply to prevent a subscriber from denying that a consolidated company which succeeds his own was legally incorporated;[1] nor where at the time of signing the articles the names of the directors had not been inserted;[2] or to a case where there is a total non-user of the corporate franchise;[3] nor where the time within which work should have been commenced has expired.[4]

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[1] Mansfield, etc., R. Co. v. Stout, 26 O. St. 241; Brown v. Dibble, 65 Mich. 529; 32 N. W. Rep. 656.

[2] Dutchess C. C. & R. R. Co. v. Mabbett, 58 N. Y. 397; Cayuga Lake R. R. Co. v. Kyle, 64 N. Y. 185; Phœnix Warehousing Co. v. Badger, 67 N. Y. 518.

[3] Ruggles v. Brock, 6 Hun, 164; Meed v. Keeler, 24 Barb. 20; Abbott v. Aspinwall, 26 Barb. 202; McFarlan v. Triton, 4 Denio, 392; Childs v. Smith, 46 N. Y. 34.

[4] McCully v. Pittsburgh & C. R. R. Co., 32 Pa. St. 25.

CHAPTER IV.

POWERS DERIVED FROM CHARTER AND CONSTRUCTION OF SAME—IN GENERAL.

§ **60. Construction of language of charters.**—When a charter is granted to or articles of incorporation executed by persons, its terms are those of a contract between the incorporators and the state which is construed according to its spirit and intent as other contracts. The general rule is that the powers of corporations organized under statutes are such, and such only as those statutes confer. That which is fairly implied is as much granted as what is expressed.[1]

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[1] A corporation may sell any or all its property in the absence of a prohibition in its charter, and if it acts in accordance with the duly expressed will of its stockholders. Leathers v. Janney, 41 La. Ann. 1120. May borrow money to pay a debt previously contracted; and such transaction is not an increase of indebtedness within constitutional prohibition against increasing indebtedness. Powell v. Blair, 7 Pa. Co. Ct. R. 492. May receive its own capital stock from a

But subject to this implication the general rules of construction applicable to all statutes govern those creating corporations. All legal provisions relate to the corporation as a whole, and not to the individuals composing it.[1] An act of the legislature giving a corporation power to extend its operations does not

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stockholder and pay therefor with bonds of another corporation with which he had originally purchased the stock. Rollins v. Shaver W. & C. Co., 80 Ia. 380; 45 N. W. 1037. See also County Ct. v. B. & O. R. Co., 35 F. 161; Rochester H. & L. Co. In re 110 N. Y. 119; 17 N. E. 678. One mining corporation may contract with another for common benefit and advance money to the latter for construction of drains. Sutro T. Co. v. Seg. B. Min. Co., 19 Nev. 121; 7 P. 271. May buy off competition where it does not create a monopoly. Leslie v. Lorillard (N. Y.), 18 N. E. 363. May make negotiable paper. Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513; 7 A. 318; Nat. Bank v. Young, 41 N. J. Eq. 531; 7 A. 488. May, when chartered for the purpose of manufacturing, disposing of, and dealing in engines, boilers, etc., make valid contracts of sale, not only in the state by which it was incorporated, but in all other states where the sale is not prohibited by local laws. Hall v. Tanner & De Laney Engine Co. (Ala.), 8 So. 348. Railroad companies may contract for shipping room in a vessel. Norfolk & W. R. Co. v. Shippers, Comp. Co., 83 Va. 272; 2 S. E. 139.

Railroad company cannot guarantee profit on stock of another company as an inducement to purchase of its own stock. Memphis G. & E. Co. v. Memphis & C. R. Co. (Tenn.), 5 S. W. 52. A transfer company cannot become guarantor of the credit of a third party in a matter in no way connected with its business. Lucas v. White Line Tr. Co., 70 Ia. 541; 30 N. W. 771. Corporation given a lien on shares of stockholders to secure indebtedness does not authorize the making a loan to such stockholder. Webster v. Howe Mach. Co., 54 Conn. 394; 8 A. 482. Articles of incorporation which declare an intention to create a company "for the purpose of locating, building, owning, and maintaining a union depot for railroads," in a certain city, and for the location, building, owning, and maintaining as many different lines of railroad from said depot to the exterior boundaries of "said city" as may be necessary for the "accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," held not to indicate an attempt to create an ordinary railroad company, under section 333 *et seq.* Gen. St. Colo. People v. Cheeseman, 7 Colo. 376; 3 P. 716.

A corporation can make no contracts and do no acts, either within or without the state which creates it, except such as are authorized by its charter. Ewing v. Toledo Savings Bank, 43 Ohio, 31; 1 N. E. 138.

[1] Atty.-Gen. v. Bank of Newbern, 1 Dev. & Batt. Eq. 216. A corporation empowered by its charter to "accept and execute all such trusts of every description as may be committed to it by any person or persons whatsoever, or any corporation, as may be committed or transferred to them, by order of the supreme court, or by a surrogate, or by any of the courts of record," has power to accept an appointment by the supreme court of its state to act as committee of the estate of one adjudged an habitual drunkard. Glaser v. Priest, 29 Mo. App. 1.

change its character or attributes, and therefore is not a new franchise.[1]

Every portion of the statute should be considered in connection with the nature of the objects for which the corporation is created and public convenience.[2]

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[1] State v. Society, etc., (N. J.) 5 A. 724.

[2] Strauss v. Eagle Ins. Co., 5 Ohio St. 59. Where the charter of a corporation authorized it to borrow money "not exceeding one half of the par value of the capital stock," it was held that it could only borrow to the extent of one half of the capital actually paid in on subscriptions, although subscriptions had been made for the full amount of its capital stock. Lehigh Ave. R. R. Co. App., 129 Pa. St. 405; 5 L. R. An. 367. The same rule applies in paying dividends to stockholders and of regulating the amount of taxes due to municipalities having the power to tax, and in all these cases the amount of stock actually paid is the capital stock of the company. Citizens' Pass. R. R. Co. v. Phil, 49 Pa. St. 251; Second, etc., R. R. Co. v. Phil., 51 Pa. St. 465; Phil. v. Ridge Ave., etc., R. R. Co., 102 Pa. St. 190. A charter authorizing a railroad company to use steam as its motive power, and to carry freight and passengers, authorizes the construction and use of the appliances ordinarily used for those purposes, though no express power is given to use locomotive engines or the heavy freight and passenger cars commonly used to carry freight and passengers, or to use the "T" rails in common use on steam railroads. App. of Burrough of Millvale (Burrough of Millvale v. Evergreen Ry. Co., 131 Pa. St. 1; 18 A. 993; 25 W. N. C. 142.) The provisions in the charter of a street railroad company, authorizing it to construct and maintain its tracks "upon and over such streets" in the city, "except in" certain of the streets therein mentioned, "as shall from time to time be fixed and determined by the city council," are not to be construed to prevent the company from laying its tracks "across" one of the excepted streets. State v. Newport St. Ry. Co. (R. I.), 18 A. 161. The fact that the company had previously laid a track across one of the excepted streets without hindrance, in order to reach a wharf, upon which they were authorized to run their cars, confirms the inference that such a power was not excluded by the charter. Id. See City of Concord v. Concord Horse R. R. (N. H.), 18 A. 87; City of Elmira v. Maple Ave. R. Co., 51 Hun, 636; 4 N. Y. S. 943; Canal, etc., St. Ry. Co. v. New Orleans 39 La. An. 709. Rev. St. Ill., c. 32, sec. 5, which authorizes corporations to exercise all powers necessary to carry into effect the objects for which they are formed, does not empower a gas company, incorporated for the purpose of supplying gas to towns, to lay pipes in the streets of the town, whose charter gives the town authorities power to control and regulate its streets, without consent of the town. Chicago Municipal Gas-Light & Fuel Co. v. Town of Lake, 130 Ill., 42; 22 N. E. 616. See People v. Newton, 112 N. Y. 396; 19 N. E. 831, holding that neither the charter nor a general law gave a horse car company authority to excavate, amend and change the motive power to a subterranean cable without the consent of the city council. A literary corporation having power to contract and buy and sell real and personal property for the purpose of "sustaining and carrying on said institution of learning, and not otherwise," has power to make a contract donating money to a railroad company to aid in constructing its road,

The public necessity for the act is of importance in determining the intention of the legislature, in authorizing the formation of a corporation. If, however, the cause or object of the statute is not apparent or ascertainable, the intention may be gathered from other circumstances. Whatever is within the intention is within the statute, though not within the letter, and what is clearly not intended is not within the statute, though within its letter.[1]

§ 61. Grant construed as if made to an individual.—Whatever incidents would attach to the performance of a duty or the exercise of a privilege by an individual under like circumstances, are within the spirit of the act and follow the grant of powers to a corporation.[2] Being a mere creature of law, it possesses only those powers which are given to it by its charter,

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where the road will be of benefit to the association in giving a means of access for persons and supplies, and for shipping the produce of its land. Louisville & N. R. Co. v. Literary Society of St. Rose (Ky.), 15 S. W. 1065. National banks are prohibited making loans on real estate; but under Rev. St. U. S., sec. 5137, a national bank "may purchase, hold, and convey real estate . . . . mortgaged to it in good faith by way of security for debts, previously contracted." It was held, that a mortgage given to such a bank by way of security for an indebtedness previously contracted, and evidenced by *new* notes of the mortgagor, was valid. Farmers & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 152; 12 N. E. 439.

[1] People v. Utica Ins. Co., 15 Johns. 358. In Civil Code, Cal., § 498, requiring street railway tracks to be placed "as nearly as possible" in the middle of the street, the words "as nearly as possible" are equivalent to "as nearly as practicable." Finch v. Riverside & A. Ry. Co. (Cal.), 25 P. 765. Act Pa. May 14, 1839, provides that a company may be formed for the purpose of constructing a street railway for public use in the conveyance of passengers by any other power than locomotives. It was held, that this grants, by implication, to the company so formed, power to construct and operate an electric railway. Lockhart v. Craig St. Ry. Co. (Pa.), 21 A. 26.

[2] Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 1. A corporation whose object is to mine limestone and to manufacture and sell lime cannot purchase goods to be resold except to carry on a supply store or otherwise aid in its principal business. Chewacla Lime Works v. Dismukes, 87 Ala. 344; 6 So. 122. But it is not *ultra vires* for a trading corporation to lend money to one dealing with it to enable him to carry on the transactions. Holmes, etc., Co. v. Willard, 53 Hun, 629; 5 N. Y. S. 610.

either expressly or by implication, as necessary and incidental to a due performance of its duties, the exercise of its privileges and furtherance of the objects of its creation.[1] The enumeration of powers in a charter confers those and what are fairly implied; but such enumeration of powers excludes all others than those that are included upon a fair and reasonable construction.[2]

§ 62. **Specified powers.**—If chartered to build a bridge it may contract debts for necessary labor, land, and material, or may borrow money with which to pay for them[3]; and as evidence of such indebtedness it may

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[1] Huntington v. Nat. Sav. Bank, 96 U. S. 388; Beatty v. Knowles, 4 Pet. 152; Nat. Park Bank v. German Warehousing Co. (N. Y.), 5 L. R. An. 673; Chewacla Lime Wks. v. Dismukes, 87 Ala. 344; 6 So. 22. Alexander v. Cauldwell, 83 N. Y. 480; Sherwood v. Alvis, 83 Ala. 115; 3 So. 307. Runyan v. Koster, 14 Pet. 122; Russell v. Tapping, 5 McLean 194; Montgomery v. Mont. & W. R. R. Co. 31 Ala. 76; Vandall v. South San Francisco Dock Co., 40 Cal. 83; New London v. Brainerd, 22 Conn. 552; Fuller v. Plainfield Academic School, 6 Conn. 532; Occum Co. v. Sprague Mf'g Co., 34 Conn. 541; Winter v. Muscogee R. Co., 11 Ga. 438; Bowlingreen & M. R. Co. v. Warren County Ct., 10 Bush. 712; Weckler v. First Nat. Bank, 42 Md. 581; Pa. D. & M. Nav. Co. v. Dandridge, 8 Gill. & J. 248; Davis v. Old Col. R. Co., 131 Mass. 259; Rochester Ins. Co. v. Martin, 13 Minn. 59; Mobile & O. R. Co. v. Franks, 41 Miss. 511; 72 Am. Dec. 143; Matthews v. Skinner, 62 Mo. 329; Ruggles v. Collier, 43 Mo. 353; Downing v. Mt. Washington R. Co., 40 N. H. 231; South Newmarket Meth. Sem. v. Peasler, 15 N. H. 330; Le Conteulx v. Buffalo, 33 N. Y. 333; Brady v. New York, 20 N. Y. 312; People v. Utica Ins. Co., 15 Johns, 358; White's Bank v. Toledo F. & M. Ins. Co., 12 Ohio St. 601; Overmeyer v. Williams, 15 Ohio, 31; Straus v. Eagle Ins. Co., 5 Ohio St. 59; Diligent Fire Co. v. Com., 75 Pa. 291; Wolf v. Goddard, 9 Watts, 550; Pa. R. Co. v. Canal Commrs., 21 Pa. 9; Com. v. Erie & N. E. R. Co., 27 Pa. 339; Northwestern R. Co. v. Payne, 8 Rich. L. 177; Shawmut Bank v. Plattsburg & M. R. Co., 31 Vt. 491. A corporation has capacity to execute a deed as attorney in fact for another. Killingsworth v. Portland Trust Co., 18 Or. 351; 23 P. 66.

[2] Minturn v. Laine, 23 Hun, 435; Mills v. St. Clair County, 8 How. 569; Fanning v. Gregoire, 16 How. 524. See also Green Bay M. R. Co. v. Un. Steamboat Co., 107 U. S. 88; 2 S. Ct. 221; N. W. Fertilizing Co. v. Hyde Park, 97 U. S. 659; St. Clair Co. Turnpike Co. v. Ill., 96 U. S. 63; Dartmouth Col. v. Woodward, 4 Wheat. 636; Perrine v. Ches. & Del. Canal Co., 9 How. 184; Augusta Bk. v. Earle, 13 Pet. 587; Thomas v. West Jersey R. R. Co., 101 U. S. 71; Chicago G. & C. Co. v. People's G. & C. Co., 121 Ill. 530; 13 N. E. 169; Franklin Bank v. Commercial Bank, 36 Ohio St. 355; Balsley v. St. Louis A. & T. H. R. Co., 119, Ill. 68; 8 N. E. 859.

execute a note or bond secured by mortgage or otherwise. The natural import and obvious meaning of the language employed should govern in the construction of constating instruments. General incorporation acts usually specify the contents of the instrument to be executed and filed, and also specify the powers which corporations organized under their provisions may possess or exercise. Such an instrument answers in all respects the purpose of a special charter, and should contain only such facts as the statute requires. A mere claim of powers in the certificate does not convey them; nor can any be acquired additional to those specified in the statute.[2] "The general laws creating a corporation must be read into its charter." [3]

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[1] Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280. A mortgage by a corporation, if valid when executed, is not invalidated by the fact that certain persons, who, at that time, had a right to receive some of its stock on surrender of the stock of another company, did subsequently make the exchange. Donohue v. Mariposa Land & Min. Co., 66 Cal. 317; 5 P. 495.

A corporation authorized to make a mortage to secure bonds for money borrowed to carry on its business, transferred the mortgage directly to the person of whom it borrowed the money. *Held*, that it was not a diversion of the mortgage from its intended use. Davidson v. Westchester Gas-light Co., 99 N. Y. 558; 2 N. E. 892.

But where the charter of a turnpike company authorized the company to levy a tax upon adjoining property owners to aid in constructing the road, it was held that the company had no right, in the absence of an express charter provision authorizing them to do so, to borrow money in order to complete the road at an earlier date, and charge the interest paid of the loan to the taxpayer, and include it in the tax levied. Lewis & Mason Co. Turnpike Road Co. v. Thomas, (Ky.) 3 S.,W. 907. A savings bank incorporated for the purpose of receiving deposits, etc., with power to loan money, to discount in accordance with bank usages, and "to borrow money, buy and sell exchange, bullion, banknotes, government stocks, and other securities," has no power to deal in cotton futures, either as principal or agent. Affirming 44 Hun, 412. Jemison v. Citizens' Sav. Bank, 122 N. Y. 35; 25 N. E. 264.

[2] Oregon Ry., etc., Co. v. Oregonian Ry. Co., 130 U. S. 1; 9 S. Ct. 409; Roberts' and Payne's Appeal, 60 Pa. St. 400; Thomas v. R. R., 101 U. S. 71; People v. Utica Ins. Co., 15 Johns. 358; Penn. R. R. v. St. Louis, etc., R. R., 118 Id. 290, 307; Ancient Club v. Miller, 7 Lansing 412; Grangers' Ins. Co. v. Kamper, 83 Ala. 325; Rochester Ins. Co. v. Martin, 13 Minn. 54; Albright v. Lafayette Ass'n, 102 Pa. St. 411; Bigelow v. Gregory, 73 Ill. 197; Western U. T. Co. v. U. P. Ry., 1 McCrary, 418; Eastern Plank-road Co. v. Vaughan, 14 N. Y. 546; supra, § 52.

[3] Appeal of Booz, (Pa.) 1 A. 36.

The articles may include many purposes specified in the general act.[1] If the statute has fixed the voting powers and qualifications of stockholders incorporators cannot, either by inserting provisions in the articles, or by the enactment of by-laws, enlarge or diminish the rights of members in violation of the terms of such statute.[2] A liberality was formerly indulged, which under ample facilities for forming corporations for almost innumerable objects and purposes under general laws would be unnecessary and confusing if not disastrous to other interests at the present day.[3]

§ 63. **Incidental powers.**—All such incidental powers are implied as are necessary to carry out and exercise those expressly granted.[4] The charter of a cor-

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[1] Bird v. Daggett, 97 Mass. 494.

[2] Commonwealth v. Nickerson, 10 Phil. 55; Appeal of Booz, *supra*. Corporations having a membership composed entirely of citizens of the United States may locate mining claims under statutes of Colorado and Rev. St. U. S., sec. 2319, which provides that mineral lands may be occupied and purchased "by citizens of the U. S. and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners," etc. McKinley v. Wheeler, 130 U. S. 630; 9 S. Ct. 638; Thomas v. Crisholm; 13 Colo. 105; 21 P. 1019.

[3] In an early Pennsylvania case it was held that no presumptions can be indulged or additions made to help a charter doubtful of its terms. The court said: "A doubtful charter does not exist because whatever is doubtful is decisively against the corporation." Com. v. Erie & N. E. R. R. Co., 27 Pa. St. 339. See also Wilmartle v. Crawford, 10 Wend. 342; Old Colony R. R. Co. v. Evans, 6 Gray, 25; Union Bank v. Jacobs, 6 Humph. Tenn. 525; Ohio Life Ins. Co. v. Merchants' Ins. Co., 11 Id. 1; McKiernan v. Lentzen, 56 Cal. 61; Fertilizing Co. v. Hyde Park 97 U. S. 659; N. Y., etc. v. Kip, 46 N. Y. 546; Babcock v. N. J. Stock Yard Co., 20 N. J. Eq. 296; Thompson v. Androscoggin Improvement Co., 58 N. Y. 108.

A bank prohibited from dealing in goods, wares and merchandise cannot take consignments to sell on commission. Bates v. Bank of the State, 2 Ala. 451. Power to make loans upon such terms for such commissions in addition to interest as shall be stipulated, etc., does not authorize the taking of usury. Caldwell v. Com. Warehouse Co., 4 Thompson & Cook, 179; 1 Hun, 718. See Johnson v. Griffin Banking Co., 55 Ga. 691.

[4] Sumner v. Marcy, 3 Woodl. & Minot, 105. See Hunter v. Marlboro, 2 Id. 168; Beatty v. Knowlet, 4 Pet. 152; Starke v. High Arch. Corp., 3 Taunt. 792.

poration need not be consulted for authority to make contracts and to sell and mortgage its property. It may exercise its common law right in these matters like an individual.[1] Unless restrained by their charters they have implied power to mortgage their property, to secure repayment of borrowed money or other debts,[2] to secure future advances;[3] to become parties to negotiable paper in the transaction of their legitimate business; to deal precisely as individuals seeking to accomplish the same ends;[4] to make all contracts that are necessary and usual in the course of the business transacted or as a means of enabling the accomplishment of legitimate objects.[5]

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[1] White Water Valley Canal Co. v. Vallette, 62 U. S.; 21 How. 424; Partridge v. Badger, 25 Barb. 146; Beers v. Phœnix Glass Co., 14 Barb. 358; Dana v. Bank of U. S., 5 Watts & S. 223; Frazier v. Willcox, 4 Rob. La. 517; U. S. Bank v. Hurth, 4 Ba. Mon. 423; State v. Bank of Md. 6 Gill. & J. 205; Pierce v. Emery, 32 N. H. 486; De Groff v. American Linen Thread Co., 21 N. Y. 124; Williams v. W. U. Tel. Co., 93 N. Y. 162; Barry v. Merchants, Exch. Co., 1 Sandf. Ch. 280; Leathers v. Janney, 41 La. Ann. 1120; 6 L.R. Ann. 661; 6 So. 884. Carpenter v. Black Hawk Gold Min. Co., 65 N. Y. 49; De Reyter v. St. Peter's Church, 3 N. Y. 238; King v. Merchants' Exch. Co., 5 N. Y. 547; Clay v. Towle, 78 Me. 86; 2 A. 852; Woods v. Meyers (Miss.), 7 So. 359; Richards v. Merrymack & C. R. R. Co., 44 N. H. 127.

[2] Truscott v. King, 6 N. Y. 160; Walker v. Suediker, Hoffman Ch. 145.

[3] Chicago, R. I. & P. R. R. Co. v. Howard, 74; 7 Wall. 413; Fifth Ward Sav. Bk. v. Bank, 48 N. J. L. 513; 7 A. 318; Salmon Riv., etc., Co. v. Dunn (Idaho), 3 P. 911; Farnum v. Blackstone Canal Corp., 1 Summ. 46. When a corporation has power, under any circumstances, to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. National Bank of Republic v. Young, 41 N. J. Eq. 531; 7 A. 488.

[4] Eureka Iron & Steel Works v. Bresnahan, 60 Mich. 332; 27 N. W. 524; Bissell v. Mich. So. & N. I. R. R. Co., 22 N. Y. 283; Curtis v. Leavitt, 15 N. Y. 267; Fay v. Noble, 12 Cush. 1; Davis v. Sec. Un. Meeting House, 8 Met. 321; Reynolds v. Stark County, 5 Ohio, 205; Brady v. Brooklyn, 1 Barb. 584; Madison W. & M. P. R. Co. v. Watertown & P. P. R. Co., 5 Wis. 173; Macon v. Macon & W. R. Co., 7 Ga. 221; Hamilton v. Lycoming Mut. Ins. Co., 5 Pa. St. 339; King v. Mer. Exch. Co., 2 Sandf. 696. A mutual fire insurance company can borrow money to pay its losses and give its notes therefor. Orr v. Ins. Co., 144 Pa. St. 387; 6 A. 69.

[5] Derringer v. Derringer, 5 Houst. 528; Farmers' Loan & T. Co. v. Pery, 3

§ **64. Of corporations performing public duties.**—Among incidental powers of railroad corporations are the erection and maintenance of depots, car-houses tanks, repair shops, switches, branch lines, coal and wood yards, etc. In determining the legality of the exercise of incidental powers courts will not stop to investigate the expediency of the action nor to inquire whether or not better means were available for the accomplishment of the authorized objects of the corporation.[1]

Sandf. Ch. 347; Home Ins. Co. v. N. W. Pack. Co., 32 Iowa, 244; Sutro Tunnel Co. v. Seg. B. Min. Co., 19 Nev. 121; 7 P. 271; Re Howe, 1 Paige Ch. 214; Hope Mut. L. Ins. Co. v. Perkins, 38 N. Y. 404; Feeney v. People's F. Ins. Co., 2 Robt. 599. It was held that a corporation organized to buy, improve, lease, sell, and otherwise dispose of real estate "in and near South San Francisco," also to build water front protection slips, docks, piers, wharves, warehouses, and otherwise improve such property as may be obtained by the company, having purchased real estate near the site of its main operations, "may in order to enhance and improve such real estate contribute to the construction of a railroad to it." Vandall v. S. F. Dock Co., 40 Cal. 89. A gravel road company authorized to construct a certain road and to collect tolls thereon, complies with its charter by the purchase of a like road located on the same route. State v. Hannibal & V. Gravel Road Co., 37 Mo. App. 496, holding also that a toll road company which is authorized by its charter "to erect and maintain such toll-gates as the corporation may deem suitable to its interests" has no right to change the location of such gates after it has once established them.

[1] Bailey v. Birkenhead, etc., R. R. Co., 12 Beav. 433; Oglesby v. Attrill, 105 U. S. 605. In Curtis v. Leavitt, 15 N. Y. 9, Comstock J., said: "It is plain that corporations, in executing their express powers, are not confined to means of such indispensable necessity that without them there could be no execution at all. The contrary doctrine would lead at once to a very great absurdity; for if there are several modes of accomplishing the end, neither one is indispensable, and each would exclude all the others. And thus, by inevitable logic, an express grant of power would be forever dormant, because there are more modes than one of carrying it into execution. It is almost as difficult to say that the incidental power depends for its existence on the degree of necessity which connects it with the power in chief. Such a doctrine would impose upon courts a never-ending difficulty, for the inquiry would always be whether the chosen instrumentality is the very best that could be selected; and if not the very best, however minute the difference may be, then the inevitable decision must follow that the choice was fatally bad, although strictly adapted to the end in view, and made in the utmost good faith. These demonstrations would seem to leave but one other conclusion, which is, that corporations, along with their specific powers, take all the reasonable means of execution, all that are convenient and adapted to the end in the view, although not the very best by many degrees of comparison. And this is a doctrine which must necessarily result in the liberty of choice amongst those means. The choice may be wise or unwise. If made in the ex-

A very liberal construction will be given to charters of corporations formed to promote public improvements in the matter of implied and incidental powers.[1]

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ercise of an intelligent good faith, the wisdom of the selection may be called in question, but the power to make it cannot be." A railroad company authorized by its charter to construct and operate a road between New York & Philadelphia, and to provide suitable vessels at either end of the line to transport passengers and freight across intervening waters, and to charge such rates of toll and freight *thereon* as it should deem proper, and providing it should not charge exceeding eight cents per ton per mile for passengers, was held limited by the word "thereon" to the railroad proper in fixing rates, and it was not allowed to make an additional charge for transportation across the intervening waters forming a part of the distance between the two cities. Camden & Amboy R. R. Co. v. Briggs, 2 Zab. 623. A charter authorizing a canal company to impose tolls upon vessels and goods, wares and merchandise loaded thereon will under no circumstances authorize the imposition of a toll on passengers. Perrine v. Chesapeake & Del. Canal Co., 9 How. 172. A water company authorized by its charter to take water from a stream, by purchase or otherwise, to supply a town with water "for the extinguishment of fires, and for domestic, sanitary and other purposes," has no right as against the mill-owners on the stream below its dam to take more water than is ordinarily needed for the purposes enumerated, in order to use the surplus for its own benefit in supplying power to manufactories, though this larger supply might be necessary to protect the town in case of a general conflagration. In re Barre Water Co. (Vt.), 20 A. 109. Priv. Laws Me. 1885, c. 522, sec. 3, which authorizes the water company therein named to "take, detain and use the water of the Oyster River pond and all streams tributary thereto," does not restrict the company to such a taking as will not interfere with the natural flow of the stream below the pond, nor to a detention of the waters in reservoirs outside of the pond, but authorizes it to detain such waters in the pond itself. Ingraham v. Camden & R. Water Co., 82 Me. 335; 19 A. 861.

[1] Where the charter authorized a street railway company to use "steam, horse or other power," it was held that electric motive power might be used, the words "other power" not signifying other animal power. And in the same case a section of a city ordinance authorizing the use of electricity as a motive power, such authority was broad enough to authorize its use by means of any system of application which is applied as suitable; and the only successful way of using such power appearing to be the erection of poles upon the sidewalks it was held that it was not prohibited from doing so by a subsequent section of the company's charter, providing that the company should not incumber any portion of the streets not occupied by its tracks. Taggart v. Newport St. R. R. Co. (R. I.), 19 A. 326; 7 Ry. & Corp. L. J. 385. Such prohibitions are viewed as limitations upon the powers of the corporation in whose charter they are inserted, and are to be reasonably not strictly construed either for or against. If the utility of the structure is obvious and the public convenience more than offsets its obstructive effect, it should not be held any obstruction within the meaning of such prohibitions, but within the scope of the powers incidental to the principal power conferred. Telegraph, telephone and electric railway poles

§ 65. No incidental power to become accommodation indorser.—But it is well settled that the power to indorse promissory notes for the accommodation of the makers, whether for or without consideration paid, is not incidental to the powers usually conferred upon corporations for banking, insuring, manufacturing, and the like.[1]

§ 66. Or shareholder in another corporation.—Corporations have no implied power to take shares in another existing or in a new company. So held under a statute providing that " no corporation shall employ its stocks, means, assets or other property, directly or indirectly, for any purpose whatever, than to accomplish the

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are, as a general rule, very slightly in the way of travel, being placed as hitching posts, lamp posts and mail boxes are placed near the front margins of the sidewalks. They are not necessarily incumbrances to public travel and locomotion, because they are slightly in the way; but as said in the last mentioned case, "It is slightly in the way, and if it served no useful purpose in regard to the street might justly be deemed to incumber it. But it supports a lamp post or electric light which illuminates the street at night, and so improves the street for its proper uses. It is not, therefore, an incumbrance in any proper sense of the word." In Sherman Center Town Co. v. Russell (Kan., May, 1891), 26 P. 715, it was held that a contract entered into by a town company, incorporated "for the purchasing of lands, the surveying and platting of town sites and selling town lots and other lands," in which it was agreed that R. would remove a bank, barn and restaurant located elsewhere to the town site, the town company would convey to him certain lots in the town, and pay him the sum of $1,000, tends directly to enhance the value of the remaining property of the corporation, and is not necessarily *ultra vires*. See also Town v. Swigart, 43 Kan. 292; 23 Pac. Rep. 569; and Town Co. v. Morris, 43 Kan. 282; 23 Pac. Rep. 569. The authority given a railroad company by its charter to construct branch or lateral roads, gives it power to construct a branch line running in the same general direction as the main line. Blandon v. Richmond F. & P. R. Co. (Va.), 10 S. E. 925.

[1] Nat. Park Bank. v. German Warehousing Co., 116 N. Y. 281; 5 L. R. An. 673; Central Bank v. Empire Stone-dressing Co., 26 Barb. 23; Bridgport City Bank v. Empire Stone-dressing Co., 30 Barb. 421; Farmers' & M. Bank v. Empire Stone-dressing Co., 5 Bosw. 275; Morford v. Farmers' Bank, 26 Barb. 568; Ætna Nat. Bank v. Charter Oak. L. Ins. Co., 50 Conn. 167; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Davis v. Old Colony R. Co., 131 Mass. 258; Culver v. Reno R. E. Co., 91 Pa. 367; Hall v. Auburn Turnp. Co., 27 Cal. 255.

legitimate objects of its creation."[1] The disability of a corporation to take stock in others is a common law disability.[2] The disability applies alike to foreign and domestic corporations.[3]

§ 67. **The incidental power must be necessary.**—In order to derive a power in a corporation by implication, it must appear that the power thus sought to be implied is necessary to the enjoyment of the specially granted right without which the latter would fail;[4] and a corporation will not be allowed to exer-

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[1] Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio, 44; 18 N. E. 486; 26 Am. Eng. Cor. Cas. 55. See also Cent. R. Co. v. Penn. R. Co., 31 N. J. Eq. 475; Franklin Co. v. Lewiston Sav. Bank, 68 Me. 43; Central Co. v. Collins, 40 Ga. 582. One railroad company which has acquired a majority of the stock of another will not be allowed in the absence of express statutory authority to vote such stock either by itself or by individuals acting in its interest in the election of officers or in matters pertaining to the management and control of the latter company; at least, where the two roads are rivals having substantially the same field of operation, where a conflict of interest may arise in the matter of expenditures or in the division of patronage or of earnings, where the profits of one company may be enhanced by a diminution of those of the other. Memphis & Charleston R. R. Co. v. Woods, 88 Ala. 630; 7 So. 108; 7 L. R. An. 605.

[2] Milbank v. N. Y. L. E. & W. R. Co., 64 How. Pr. 20; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1; 9 S. Ct. 409; Central R. Co. v. Collins, 4 Ga. 582; Hazelhurst v. Savannah G. & N. A. R. R. Co., 43 Ga. 13; Wilkes v. Georgia Pac. R. Co., 79 Ala. 181.

[3] Paul v. Virginia, 75 U. S. 168; White v. Howard, 46 N. Y. 144. A statute providing that in the case of connecting and continuous railroads the corporations controlling them may make arrangements either by amalgamation or some other arrangement for bringing them under one control, was held not to authorize the purchase of stock. M. & C. R. R. Co. v. Woods, supra; McIntosh v. Flint, & P. M. R. R. Co., 34 Fed. Rep. 582, 615. A statute forbidding one corporation to subscribe for or purchase the stock or securities of another corporation does not apply where one has made advances on the mortgage bonds of the other which it is unable to redeem. Taylor Co. Ct. v. B. & O. R. R. Co., 35 Fed. Rep. 161. A voluntary association organized to control corporations having obtained the stock of a corporation has no power to sell or alienate such stock, such act being inconsistent with the purposes of its creation. Gould v. Head, 38 Fed. Rep. 886. Under the provisions of the constitution of Georgia a purchase by a railroad company of a contract to construct a competing line with a view to prevent its construction is illegal and void. Langdon v. R. & Bkg. Co., 37 Fed. Rep. 449.

[4] McIntyre v. Ingraham, 35 Miss. 25, 55. See Charles River Bridge v. Warren Bridge, 11 Pet. 420; Oswego Falls Bridge Co. v. Fish, 1 Barb. N. Y. Ch. 547; Rice v. R. R. Co., 1 Black 358; Jefferson Branch Bank v. Skelly, Ib. 436; Rich-

cise incidental powers which would operate as an infringement upon the rights of individuals not in any way connected with the compact between the state and such corporation.[1]

§ 68. **Grants when permissive and when imperative.**—Though words in a charter directory or permissive in form usually leave the doing of the acts so enumerated optional with the corporation, yet when clearly for the public benefit, the doing of such acts is obligatory.[2] Where the manner of exercising corporate powers is prescribed, the requirements of the statute must not be departed from in any essential particular.[3]

§ 69. **Construction of exemptions and special privileges.**—Grants of franchises and exemptions in charters are construed most strongly in favor of the public and against the grant.[4] These are common law doctrines applicable to all grants. The character and purposes of the particular corporation whose powers are

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mond, etc., R. R. Co. v. Louisa R. R. Co., 13 How. 71; Macon Webster R. R. Co. v. Davis, 13 Ga. 68; Wood, etc., v. Davis, 13 Ga. 68; Wood Hydraulic Hose Mining Co. v. King, 45 Ga. 34; Thorpe v. Rutland, etc., R. R. Co., 27 Vt. 140; State v. Chase, 5 Ohio St. 528; Collins v. Sherman, 31 Miss. 679; Gaines v. Coates, 51 Ind. 335; Com. v. Central Passenger R. R., 52 Pa. St. 506; Mathews v. Skinker, 62 Mo. 329. A power granted to construct a public road and to collect tolls from carriages and passengers thereon does not include as an incident the right to establish stage and transportation lines over such road. Downing v. Mt. Washington R. Co., 40 N. H. 230.

1 Auburn & Cato Plank R. Co. v. Douglas, 9 N. Y. 444. Thus it was held that a right to build a dam across a stream could not be exercised in such manner as to overflow mill property on the stream above; nor the right to maintain a stock-yard be used in such a way as to injure others. Lee v. Pembroke Iron Co., 57. Me. 481.

2 Rex v. Mayor & Jurats of Hastings, 1 Dawl. & Ryl. 148.

3 Goshorn v. Superiors, 1 W. Va. 308; Pratt v. Short, 79 N. Y. 437.

4 Richmond R. R. Co. v. Louisa R. R. Co., 13 How. U. S. 81; Black v. Del. & Raritan Canal Co., 22 N. J. Eq. (7 C. E. Green) 130; Rice v. R. R. Co., 1 Black (U. S.) 380; Perrine v. Chesapeake, & Del. Canal Co., 9 Id. 172; Pennock v. Coe, 23 Id. 132; Phila. & Erie R. R. Co., v. Catawissa R. R. Co., 53 Pa. St. 20. See Sedgwick on Stats. 259, 327.

under consideration and its relations to the public are often valuable guides in a construction of such powers. A railroad company with which the owner of real estate had contracted to convey to it ground for a depot and certain town lots to be used by the company for speculative purposes in addition was denied a decree of specific performance with respect to the lots. The Court said:—"It is easy to perceive how such a transaction might be perverted so as to operate most injuriously to the public. Speculators and landed proprietors, for the purpose of enhancing their property, would always be on hand to obtain locations, and forcing people to their premises, regardless of the consideration whether they were the most proper and convenient; and the companies, tempted by the prospect of gain, would accede to these propositions, and thus the general welfare and good of the public would be sacrificed to subserve mere private interests."[1]

§ 70. Construction affected by public interest in the grant.—There is an essential difference between the rules of construction applicable to general legislation concerning those objects in which the public at large are interested, and those applied to private grants to individuals and corporations, although involving in their exercise incidental benefits to the public. The latter are to be expanded liberally in favor of the public and strictly against the grantees; the former largely and beneficially for the purposes for which they were enacted.[2]

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[1] Pacific R. R. Co. v. Seely, 45 Mo. 212.

[2] Bradley v. N. Y. & N. H. R. R. Co., 21 Conn. 294. The fact that a railroad company empowered by its charter "to joint stock or consolidate with any other railway company running in the same general direction" is forbidden to "rent, sell, lease or consolidate with any parallel or competing railroad" held not to impliedly authorize it to sell its road and franchises to a company whose road, though not a parallel or competing line, does not run in the same general direction. See East Line & R. R. Co. v. State, 75 Tex. 434; 12 S. W. 590. Compare Gere v. N. Y. Cent. & H. R. R. Co., 19 Abb. N. C. (N. Y.) 193.

A relinquishment of the taxing power by the state will never be assumed in favor of a corporation. The whole community is interested in retaining the power to tax property no matter by whom it is owned undiminished. The community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.[1]

Charters of canal and railroad companies with respect to the right to exact freight and tolls are construed strictly in favor of the public.[2] And a right granted to lay out highways does not include the right to bridge navigable waters, nor to obstruct existing highways unless such acts are necessary to prevent a failure of the rights expressly granted.[3]

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1 Providence Bank v. Billings, 4 Pet. 514.

2 Camden & Amboy R. R. Co. v. Briggs, 2 Zab. 623; Jersey City Gas L. Co. v. Consumers' Gas L. Co., 40 N. J. E. 427; 2 A. 922; Stourbridge Canal Co. v. Wheeler, 2 B. & Adol. 793. See Barrett v. Darlington & Stockton R. R. Co., 2 Man. & Gr. 134; s. c. 7 Id. 870; Proprs. of Leeds & Liverpool Canal v. Hustler, 1 Barn. & Cress. 424; Gildart v. Gladstone, 11 East. 675. Where power is conferred on a corporation to raise a lake above low-water mark as a reservoir to hold water for hydraulic purposes, this gives it no right to lower the level of the lake by drawing water out. Cedar Lake Hotel Co., v. Cedar Lake Hydraulic Co., (Wis.) 48 N. W. 371.

3 Com. v. Erie & N. E. R. R. Co., 27 Pa. St. 339; Lees v. Canal Co., 11 East. 652; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Mills v. St. Clair County, 8 How. 581; Ohio Life and Trust Co. v. Debolt, 16 Id. 435; Holyoke Co. v. Lyman, 15 Wall. 500; Parker v. Gt. Western R. R. Co., 7 M. & Gr. 253; Miners' Bank v. U. S., 1 Green, Iowa, 553; Mohawk Bridge Co. v. Utica & Schenectady R. R. Co., 6 Paige, Ch. 554; Camden v. Amboy R. R. Co. v. Briggs, 2 Zab. 623; Townsend v. Brown, 4 Id. 80; Bridge Co. v. Hoboken Land, etc., Co., 3 Beas. Ch. 81; Collins v. Sherman, 31 Miss. 679; Auburn & Bate Plank R. Co. v. Douglas, 9 N. Y. 444; Commrs. on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446; Sedgwick on Sts. & Const. Law, 339. On this principle it was held that an act chartering a corporation, and granting it the power to make reserves of water in a great pond by erecting a dam across its outlet, and to draw it off in such quantities, at such times and in such manner as shall be most for the interest of all concerned, does not grant the public rights in the pond, and the corporation holds its right to the water subject to the paramount right of the state to use it for public purposes. Knowlton, W. Allen, and C. Allen, JJ. dissenting.—Western R. R. Co. v. Cent. Un. Tel. Co., 116 Ind. 229; 18 N. E. 14. A special act authorizing two railway companies to make connections in the

§ 71. Right to an exclusive monopoly never implied.— Courts will never construe a statute so as to give a monopoly or an exclusive privilege in the absence of language expressing such to be the deliberate intent of the legislature.[1]

This question arises in regard to grants to railroad, turnpike and bridge companies of the right of taking tolls.[2] Nothing short of an express provision

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city of Columbus, and to build side tracks and turn-outs in the streets, provided the consent of the people be obtained, held not to authorize another vote by the people and the laying of additional side tracks in the streets 30 years afterwards. Savannah & W. R. Co. v. Woodruff, (Ga.) 13 S. E. 156. The provision of Code Ga., § 1689, that, where a railroad is intended to be built between two points where a railroad is now constructed, the general direction and location of such new railroad shall be at least 10 miles from the railroad already constructed, does not prevent the building of a railroad within less than 10 miles of a railroad in process of construction, but not completed. Macon & A. R. Co. v. Macon & D. R. Co., (Ga.) 13 S. E. 157.

[1] It was held that a requirement that ten dollars per ton should be paid the state for the privilege of digging minerals did not preclude the right to grant the right to dig to other parties on the same terms. Bradley v. South Cars. Phos. Per., 1 Hughes, 72.

[2] The leading case on this question is that of Charles River Bridge v. Warren Bridge, 11 Pet. 420. In 1785 the legislature of Massachusetts had incorporated a company to build a bridge over the Charles River with power to collect tolls. Subsequently another company was incorporated to construct a bridge at the same point with like privileges. An action was brought by the first company to prevent the erection of a bridge by the latter, on the grounds that the term of its charter gave it by implication the exclusive right, and the construction of a second bridge would "be an infringement of the charter." On appeal to the Supreme Court of the United States., Taney, C. J., said: "Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle and for introducing a new and adverse rule of construction in favor of a corporation, while we adopt and adhere to the rules of construction known to the English common law, in every case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice."

See also Thompson v. N. Y. & Harlem R. R. Co., 3 Sandf. N. Y. Ch. 624; Tuckahoe Canal Co. v. Tuckahoe R. R. Co. 11 Leigh, 42; Oswego Falls Bridge Co. v. Fish, 1 Barb. N. Y. Ch. 547; Enfiled Toll Bridge Co. v. Hartford & New Haven R. R. Co., 17 Conn. 544.

granting and securing an exclusive privilege will secure one from the exercise of the right and the discretion of the legislature to authorize other enterprises of a similar nature in the immediate vicinity.[1]

§ 72. Inconsistent and ambiguous provisions in charter.—If by a reasonable construction operation can be given to all the provisions of a charter, though they are inharmonious in language they will be allowed to stand if capable.

But when the rights and privileges of a corporation are to be determined by reference to the constating instruments of another and distinct corporation containing provisions of doubtful import the construction should be against the corporation.[2]

§ 73. A distinction based on public policy.—A distinction should be borne in mind between the question whether a power is in fact granted by the state and whether the power may be exercised in a particular manner, or includes alleged incidental powers. In regard to the latter neither strict nor liberal but reasonable rules of construction are applied. If there is no ambiguity in the charter and the powers conferred are plainly marked and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it and to carry out the true meaning and intention of the legislature.[3]

§ 74. When authority will be presumed.—Though as has been seen no corporate powers will be presumed

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Livingston v. Van Ingen, 9 Johns. N. Y. 507; Ogden v. Gibbons, 4 Johns, (N. J.) Ch. 150; Shorter v. Smith, 9 Ga. 517; but see Newburg Turnpike Co. v. Miller, 5 Id. 101; Stark v. McGowen, 1 Nott. & McCord, 387.

[2] Bowling Green, etc., R. R. Co. v. Warren County, 10 Bush. Ky. 711.

[3] In re Binghamton Bridge, 3 Wall. 51. See also State v. Foslom Water Co., (Cal.) 12 P. 388; Stewart v. N. O. W. W. Co., (La.) 2 So. 416; Ernest v. Same, Id. 415.

as against the state, yet the dealings with other parties which on their face or according to their apparent import, are within their chartered powers are not to be presumed to be illegal or unauthorized without evidence. A note held by a corporation will be presumed to have been taken for a debt contracted in the course of mere ordinary dealing, and not in the exercise of an unwarranted power to lend money and discount notes.[1] In such case the burden of proving the contrary rests upon the party setting up the claim of a want of power, and he must show affirmatively that the note was not made in the proper exercise of corporate authority.[2]

A corporation forbidden by its charter to deal in any thing but bills of exchange, promissory notes, gold and silver, and the produce of its real estate may take and hold bonds and mortgages to secure debts due it.[3]

Where directors have a discretionary power to do an act otherwise than in the ordinary manner or under exceptional circumstances, a proper exercise of such discretion will be presumed unless the contrary is pleaded and proven.[4]

§ **75. Less liberal construction than formerly.**—A stricter construction should be placed upon the language of

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1 New York Fireman's Ins. Co. v. Sturges, 2 Cowen, 664; Lorillard v. Clyde, 86 N. Y. 384; Safford v. Wyckoff, 4 Hill, 442. See Express Co. v. Railroad Co., 99 U. S. 199. So in an action by a corporation formed for the purpose of manufacturing and selling machines "and all things incident thereto," on an assigned contract, the burden of showing the corporation's want of power to take the assignment is on defendant. Warder, Bushnell & Glesner Co. v. Jack, (Iowa) 48 N. W. 729.

2 Farmers' Loan & Trust Co. v. Perry, 3 Sandf. Ch. 339; Chatauqua Co., Bank v. Risley, 19 N. Y. 269, overruling S. C. 4 Denio, N. Y. 487, 488; Same v. Clowes, 3 Com. St. 470.

3 Trenton Banking Co. v. Woodruff, 1 Greens. (N. J.) 117.

4 Dockery v. Miller, 9 Humph. Tenn. 731.

the incorporating instrument—the articles of incorporation—with respect both to the extent of powers therein expressly contained and the incidental powers included, than was formerly applied to charters granted by special act.

In the latter case the legislative intent to accomplish objects beneficial to the public entered into the consideration ; while under general laws there cannot be said to be any specific intendment of the legislator or any concurrence of his will in the act of persons becoming incorporated in any case. There is no room for the argument often successfully advanced under the old system that because enough appears to indicate a general intention to endow an association of persons with corporate capacity, therefore presumptions must be indulged in and fictions invented to avoid defeating this laudable sovereign purpose.

A forcible reason for a modification of this rule of construction is found in the absence of any necessity for the latitude once indulged. Under a charter granted by special act the incorporators presumably had no voice or hand in the matter until the sovereignty had acted and must accept, or reject the charter *in toto*. But under general laws the positions are reversed, and the incorporators virtually make their own terms. There is no more reason for giving a liberal construction in their favor than in favor of a grantor in a conveyance of real estate.

CHAPTER V.

IN STATE FOREIGN TO THAT OF CREATION.

§ 76. Rights and powers fixed by laws of domicile.—The law of the state where a corporation is created fixes limits and qualifies its franchises, powers, capacities and liabilities.[1]

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[1] Crowley v. Panama R. R. Co., 30 Barb. 99; State v. Milwaukee, etc., R. R. Co., 45 Wis. 579; Chaffee v. Fourth Nat. Bank of N. Y., 71 Me. 514; Mathews v. Trustees, 2 Brewst. 541; in the absence of evidence to the contrary it cannot be presumed that a foreign corporation organized for the purpose of constructing railroads, has no power to subscribe for, take and hold stock in a railroad company. In re Rochester H. & L. Ry. Co., 45 Hun, 126. "The laws of the state creating the corporation govern when applicable to its contracts and dealings in another state, and when these are attacked such laws should be made to appear." Flournoy v. First Nat. Bank, 78 Ga. 222; 2 S. E. 547.

A power given to a railroad company to pledge its franchises, property, etc., does not authorize an outright sale to a corporation of another state. Chicago B. & K. C. R. Co. v. State of Missouri, 7 S. Ct. 1300.

It can perform no strictly corporate act without the boundaries of the state of its creation.[1]

But while the domicile of a corporation is in the legal jurisdiction of its origin and it is in its nature incapable of migration, yet its charter may confer powers without territorial limitation, and these may be exercised elsewhere if they are in conflict with no restriction of local law.[2]

With a view to enabling successful prosecution of its business a corporation may consent to be found away from home in respect to the service of process in suits growing out of its transactions.[3] The right to sue in the courts is part of the comity and need not be expressly granted.[4] But a state may by statute pro-

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[1] Where corporators, to whom a charter is granted by North Carolina, assemble in Baltimore and pass resolutions of acceptance, and there performed all the acts necessary to organize the corporation, such acts are void, and the corporation has no legal existence. Smith v. Silver Valley Min. Co., 64 Md. 85; 20 A. 1032.

[2] The franchises granted without restrictions may be exercised whenever the corporation may find it convenient, profitable and permissible, whether within or without the limits of the state creating it. Merrick v. Van Santwood, 34 Barb. 208; Atchison T. & F. R. Co. v. Fletcher, 35 Kan. 236; 10 P. 596; Santa Clara, etc., Acad. v. Sullivan, 116 Ill. 375; 6 N. E. 1834.

[3] Schellenberger ex parte, 6 Otto 369; Ins. Co. v. Francis, 11 Wall, U. S. 210; Vincennes R. R. Co. v. Bank of North Am., 82 Ill. 493.

[4] In Smith v. Weed S. M. Co., 26 O. St. 562, and in Marine & F. I. B. Co. v. Janney, 1 Barb. 489, it was held the terms of the charter of a foreign corporation need not be alleged in a pleading in order to show its capacity to sue. See also Lewis v. Bank of Kentucky, 12 O. St. 132; Silver Lake Bank v. North, 4 John. Ch. 370; Guin v. N. E. M. S. Co. (Ala), 8 So. 388; Newburg Petroleum Co. v. Weare, 27 O. St. 343; Lathrop v. Commercial Bank of Sciota, 8 Dana, 114; Hanna v. International Petroleum Co., 23 O. St. 622; Bank of Michigan v. Williams, 5 Wend, 478; Beaston v. Farmers' Bank of Delaware, 12 Pet. 135; Louisville C. C. & R. R. Co. v. Latson, 2 How. 497; Bank of Augusta v. Earle, 13 Pet. 519; Lucas v. Bank of Georgia, 2 Stew. Ala. 147; Tombigbee R. R. Co. v. Kneeland, 4 How. 16; N. Y. Dry Docks v. Hicks, 5 McLean 111; Leasure v. Union, etc., Ins. Co., 19 Pa. St. 491; Guaga Iron Co. v. Dawson, 4 Blackf. 202; Savage Mfg. Co. v. Armstrong, 17 Me. 34; Lycoming F. Ins. Co. v. Longley, 62 Md. 196; New Jersey, etc., Bank v. Thorp, 6 Cow. 46; Portsmouth Livery Co. v. Watson, 10 Mass. 91; Importing, etc., Co. v. Locke, 50 Ala. 332; Mut. Benefit Life Ins. Co. v. Davis, 12 N. Y. 569; Williams v. Creswell, 51 Miss. 817; Direct U. S. Cable Co. v. Dominion Tel. Co., 84 N. Y. 153; Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367; American, etc., Ins. Co. v. Owen, 81 Mass. 491;

hibit foreign corporations from suing in its courts or limit the right to certain designated cases.[1] It is but a just condition to the comity that a foreign corporation enjoying it shall be subject to the jurisdiction of the courts where such right or comity is enjoyed.[2]

The right to sue a foreign corporation did not exist at common law, but service might be had on the officer in charge of the resident business so as to subject its property to sequestration, attachment or execution.[3]

§ 77. **Can have but one domicile.**—But a corporation like a natural person can have but one legal residence; and in the federal courts no averment or proof as to its citizenship elsewhere than in the state of its creation will be permitted.[4] Although the place where the

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Bank of Edwardsville v. Simpson, 1 Mo. 184; Nat. Bank v. De Bernales, 1 Carr. & P. 569; Henriques v. Dutch, etc., Co., 2 Ld. Raym. 1532; British American Land Co. v. Ames, 6 Metc. 391. Compare American Colonization Soc. v. Gartrell, 23 Ga. 448, where the charter declared the corporation to be created for a specified purpose, "and for no other purpose," and its right to sue in another state was questioned; also Ayers v. Seibel (Iowa), 47 N. W. 989, where it was denied. The right to sue in another state for libel has in several cases been denied or doubted. See Bank of Marietta v. Pindall, 2 Rand. 473; Leazure v. Union Mut., etc., Co., 91 Pa. St. 491; Hahneman, etc. v. Co. Beebe, 48 Ill. 88.

1 See N. Y. C. C. P., secs. 1779, 1780; Duquesne Club v. Penn. B'k, 35 Hun, 390. See B'k of Commerce v. Rutland, etc., R. R. Co., 10 How. Pr. 1. As to right of non-resident whose debt arose outside of state to sue a foreign corporation, see Robinson v. Oceanic, etc., Co., 112 N. Y. 315; 19 N. E. Rep. 625, holding that he enjoys no such right. See also Newell v. Great Western Ry. Co., 19 Mich. 336; Despar v. Continental, etc., Co., 137 Mass. 444.

2 Thomas v. Placerville, etc., Co., 65 Cal. 600; 4 P. 641; Martens v. International, etc., Soc., 53 N. Y. 339; St. Clair v. Cox, 106 U. S. 350; 1 S. Ct. 354; Peckham v. North Parish, 33 Mass. 274, 286; Hayden v. Androscoggin, 1 Fed. Rep. 93; City, etc., Ins. Co. v. Carrugi, 41 Ga. 660. But the record must show that the foreign corporation was doing business within the jurisdiction. Henning v. Planters' Ins. Co., 28 Fed. Rep. 440; Barnett v. Chicago, etc., R. R. Co., 4 Hun, 114; Augerhoefer v. Bradstreet, Co., 22 Fed. Rep. 305.

3 Newburg v. Von Opper, etc., Co., L. R. 7 Q. B. 293. It was held that service may be had anywhere upon the president of a corporation created by Congress. Eby v. N. Pac. R. Co., 13 Phil. 144.

4 R. R. Co. v. Harris, 12 Wall. 65; Fales v. Chicago M. & St. P. Ry. Co., 32 F. 673. In Fitzgerald v. Missouri Pac. Ry. Co., 45 F. 812 (April, 1891), it was held that the decision of the supreme court of the state that a particular corporation is a corporation of that state is binding on the federal court.

agents of a corporation transact its business or keep their offices is immaterial, yet it has been held that it is its duty to keep its principal place of business in the state creating it, to enable the state to exercise visitorial powers and the courts to acquire jurisdicton. The main purpose of a corporation must be carried out at the place where it is established; but the incidental powers which are necessary for the maintaining of the corporation may be exercised elsewhere.[2]

A corporation becomes a domestic corporation of a state either by a creation of or adoption by such state. A corporation of one state may be made, by appropriate legislation, a citizen of another state. Whenever the effect of state legislation is to adopt a foreign corpora-

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[1] State v. Milwaukee R. R. Co., 45 Wis. 579; Land Grant R. R. Co. v. Commrs. of Coffee Co., 6 Kans. 245.

The Ohio & Mississippi Railroad Company was chartered by act of the Indiana legislature which did not, in terms, locate it anywhere. Immediately after receiving its charter it migrated to the state of Ohio, and established its principal place of business in that state, having received authority from the legislature of Ohio to act therein. The validity of certain corporate acts done in the latter state coming before the Supreme Court of Indiana, and the question whether at common law and upon general principles a corporation must have a "local habitation as well as a name" it was held that it could not migrate to the state of Ohio unless granted power to do so by the legislature of Indiana, and that its acts done at its office in Ohio were inoperative and void as corporate acts. Aspinwall v. Ohio & Miss. R. R. Co., 20 Ind. 492. A corporation created by act of the legislature of the state of Florida was held in Massachusetts to be a foreign corporation although many of the members and officers resided and its books and records and principal place of business were kept there. Danforth v. Penny, 44 Mass. (3 Metc.) 564. But in a similar case it was held that such foreign corporation might be deemed domestic to the extent of enabling a creditor of a stockholder to attach his interests. Young v. S. Tredegar Iron Co., 1 Pickle R. (Tenn.) 189; 2 S. W. Rep. 202. But a foreign railroad corporation is not rendered domestic by merely being authorized to construct and operate lines within a state by an act which provides that it shall be deemed a domestic corporation in all proceedings upon causes of action arising therein. Chicago M. & St. P. Ry. Co. v. Becker, 32 F. 849; Mahoney v. Ry. Co., 21 F. 817.

[2] The receiving of gifts of money and property for the purpose of an academy is a means of maintaining it, and carrying out the object for which it was formed; and the power to take, hold and convey property for such purpose may be exercised anywhere, unaffected by the restriction as to the academy's place of location. Santa Clara Female Academy v. Sullivan, 116 Ill. 375; 6 N. E. 183.

tion as one of its own, it becomes a citizen as well of the state adopting it as of that to which it owes its original charter.[1]

The National Banking Act provides that the "usual business of each national banking association shall be transacted at the office or bank located in the place specified in its organization certificate."[2]

§ 78. **No extra-territorial franchises can be conferred by a state.**—It is a fundamental principle that independent of the comity between states, no state laws can have any binding force outside the territorial limits of the state enacting them.[3] Since a franchise in the hands of a citizen clothes him with a vestige of sovereignty, it follows that a state cannot grant to a person the right to exercise it in a foreign state or country. "Every

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[1] As to whether a state has adopted, and thus domesticated, a foreign corporation, is purely a question of legislative intent. When the legislature of Arkansas provided that every railroad corporation of any other state which has heretofore leased or purchased any railroad in this state shall, within 60 days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall thereupon become a corporation of this state, it evinces by the language used a clear purpose to make such corporation a domestic one, and when such articles of incorporation or charter are filed with the secretary of state, such foreign corporation becomes a corporation of the state. James v. St. Louis & S. F. Ry. Co., 46 F. 47 (May, 1891.)

But there is a general presumption that a corporation, though carrying on business in several states, can have a residence only in the state in which it was created. Accordingly it was held that the averment that a corporation was created under the laws of a certain state precludes the idea that it may have become a resident of another state, and is sufficient in a petition for removal of a cause from a state to a federal court. Dissenting from Hirschl v. Threshing Machine Co., 42 F. 803,—Myers v. Murray, Nelson & Co., 43 F. 695.

Under Act 18th Gen. Assem. Iowa, c. 128, which gives foreign railroad companies which have filed copies of their charters with the secretary of state the same rights and privileges as domestic railroad corporations, a foreign railroad company cannot claim the rights of a domestic corporation without showing that it has filed a copy of its charter. State v. Chicago, M. & St. P. Ry. Co., 80, Iowa 586; 46 N. W. 741.

[2] Rev. St. U. S., sec. 5190. A national bank cannot make a valid contract for the cashing of checks upon it, at a different place from that of its residence, through the agency of another bank. Armstrong v. Second Nat. B'k, 38 F. 883.

[3] Story on Conflict of Laws, sec. 7; Sedwick on Const. & Stat. Law, 9.

power which a corporation exercises in another state depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without the sanction express or implied of such sovereignty, unless a case should be presented in which the right claimed by the corporation should appear to be secured by the constitution of the United States."[1] But though it must live and have its being in the state of its creation only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is a person for certain purposes in contemplation of law.[2] The rights and franchises which a state has conferred on a corporation, to be exercised within its jurisdiction, cannot be annulled by the act of another state or by a decree of its courts.[3]

§ 79. **Comity and the usages of trade.**—It is well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another and to sue in its courts. The same law of

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[1] Runyan v. Coster's Lessee, 14 Pet. 122, 129, 130, per Justice Thompson; Land Grant Ry. Co. v. Coffee County, 6 Kans. 252; Thompson v. Waters, 25 Mich. 221; Phoenix Ins. Co. v. Commonwealth, 5 Bush. Ry. 68. See also Rece v. Newport News & M. V. Co., 32 W. Va. 164; 9 S. E. 212; Baltimore, etc., R. R. Co. v. Glenn, 28 Md. 287. Const. Ark., art. 12, § 6, provides that corporations may be formed under general laws, which may be altered or repealed; that the General Assembly shall have power to alter or revoke the charter of any corporation, provided that "no injustice shall be done to the corporators." Section 11 provides that foreign corporations doing business in the state shall be subject to the same limitations and regulations as domestic, and shall not exercise any greater privileges or franchises than they do. *Held*, that a foreign railway company, having entered the state to operate a road after the above provisions were in force, was subject to legislation reducing passenger rates, provided, only, such reduction did no injustice to the corporators. St. Louis & S. F. Ry. Co. v. Gill, (Ark.) 15 S. W. 18.

[2] B'k of Augusta v. Earle, 13 Pet. 519, 588.

[3] Barclay v. Falman, 4 Edw. N. Y. Ch. 123, 130; Importing, etc., Co., of Ga. v. Locke, 50 Ala. 335; Society for Prop. of Gospel v. New Haven, 8 Wheat, 483; Merrick v. Van Santvoord, 34 N. Y. 208; Vermont v. Society for Prop. of Gospel, 1 Paine C. Ct. 653.

comity prevails among the several sovereignties of the Union. The public long continued usages of trade; the general acquiescence of the states; the particular legislation of some of them as well as the legislation of Congress—all concur in proving the truth of this proposition.[1]

It may therefore be stated, as a proposition too well settled to require the citation of authorities, that in the absence of legislation imposing restrictions, and conditions or prohibitions, corporations formed under another sovereignty may carry on business and protect their rights in the courts of any state in the Union.

They may make contracts, sue and defend in the courts, acquire real and personal property by gift or devise or by purchase, and foreclose mortgages.[2]

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[1] Bank of Augusta v. Earle, 13, Pet. 519. In Christian Union v. Yount, 101 U. S. 356, Justice Harlan said:—"In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that the corporation of one state, not forbidden by the law of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court." See also In re App. of K. C. & B. R. Co., 35 Kan. 557.

[2] It has been held that a corporation appointed administrator in another state may sue on bills and notes held in that capacity as assignee in the courts of a state the laws of which do not allow corporations to administer. Fidelity Ins. Co. v. Niven, 5 Houst. Del. 416. Under Pub. Gen. Laws, Md., art. 23, § 297, which provides that a non-resident plaintiff may sue in the courts of the state a foreign corporation doing business within a state, when the cause of action has arisen there, an action may be maintained within the state on a policy of life insurance issued by a foreign corporation to a resident of another state, where the application for insurance and the delivery of the policy both took place within the state, and the application was examined there, and the payment necessary to validate the delivery of the policy was made there. Fidelity Mut. Life Ass'n v. Ficklin, (Md.) 21 A. 680.

Under a bill of lading issued in a foreign country for goods to be transported therefrom to New York, an action for damages to the goods in course of transportation is upon a cause of action arising in New York, within Code Civil Pro., N. Y., § 1780, subd. 3, authorizing an action against a foreign corporation to be maintained by a non-resident, "where the cause of action arose within the state." Robertson v. National S. S. Co., 14 N. Y. S. 313.

§ 80. Cannot exceed authority conferred by charter in another state.—If the law creating the corporation does not by the true construction of the words used in the charter give it the right to exercise a given power within the state of its creation, it possesses no such power beyond the limit of such state. And if it appears from a fair construction of the words used in its creation that it was intended to confine its operations to the limits of the state granting corporate powers, these cannot be exercised elsewhere.[1]

Whether an agent is authorized to do a particular act and whether such act is within the corporate powers depends upon the laws of the state where the corporation was created. The legality and enforceability of the act are determined by the law of the state where it is performed.[2]

A charter cannot confer upon a corporation authority to do any act in another state not allowed to its citizens generally. The law of comity merely recognizes the authority to act in a corporate character subject to all the laws of the state where it assumes to act.[3]

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[1] Bank of Augusta v. Earle, 13 Pet. 588, 589; Aspinwall v. Ohio, etc., R. R. Co., 20 Ind. 492; Metropolitan Bank v. Godfrey, 23 Ill. 579; Bank of Washtenaw v. Montgomery, 2 Scam. 427; Ohio Life Ins. Co. v. Merchants' Ins. etc., Co., 11 Hump. 24; Thompson v. Waters, 25 Mich. 222; Diamond Match Co. v. Reg. of Deeds, 51 Mich. 145; 16 N. W. 314; Pierce v. Crompton, 13 R. I. 312; Bard v. Poole, 12 N. Y. 505. Compare Milnor v. New York, etc., R. R. Co., 53 N. Y. 363.

[2] Ellensworth v. St. Louis, etc., R. R. Co., 98 N. Y. 553. An act requiring a vote of the stockholders to convey real estate does not apply to a foreign corporation. Saltmarsh v. Spaulding, 147 Mass. 224; 17 N. E. 316. The legislature in levying a tax upon gross receipts of foreign corporations may require the same to be paid by their agents. State v. Sloss, 83 Ala. 93; 3 So. 745. Same law determines duties and liabilities of offices of foreign corporation as those of citizens occupying similar fiduciary relation. N. Y. P. & B. R. Co. v. Dixon, 114 N. Y. 80; 21 N. E. 110.

[3] Silver Lake Bank v. North, 4 Johns. N. Y. Ch. 370; Bard v. Poole, 12 N. Y. 505; Milnor v. New York, etc., R. R. Co., 53 N. Y. 363; McGregor v. Erie Ry. Co., 35 N. J. Law, 115; Bank of Augusta v. Earle, 13 Pet. 539, 395; Stetson, v. City Bank, 2 Ohio St. 174; Lewis v. Bank of Kentucky, 12 Ohio 132; Isle

§ 81. The law of comity will not authorize infringement of local laws.—The comity between states will not be allowed to avail a corporation for the purpose of evading under its cover the laws of a foreign state.[1] To give effect to such an attempt would be to facilitate the perpetration of a fraud upon both the state of its creation and that in which it seeks to exercise its powers.[2]

Royale Land Corp. v. Sec. of State, 76 Mich. 162; 43 N. W. 14. The laws of New York forbid devises to corporations except under certain conditions; and a devise made in that state to a foreign corporation was held void although it was authorized by its charter to accept testamentary devises. Boyce v. City of St. Louis, 29 Barb. N. Y. 650; White v. Howard, 46 N. Y. 144, 165; United States v. Fox, 94 U. S. 315.

Though the charter of a corporation authorizes it to charge a certain rate of interest, such rate will be deemed usurious in a state whose usury laws make it so. Hitchcock v. United States Bank, 7 Ala. 435. But see Larwell v. Hanover Sav., etc., Soc., 40 Ohio St. 274, 281. An act requiring every contract of a corporation whereby a liability may be incurred by it exceeding $100 to be in writing under its seal held not to apply to foreign corporations. Rumbough v. So. Imp. Co., 106 N. C. 461; 11 S. E. 528.

1 Gill v. Kentucky & Col. G. S. M. Co., 7 Bush. 635; Phoenix Ins. Co. v. Commonwealth, 5 Bush 68; Milnor v. New York & N. H. R. R. Co., 53 N. Y. 363; Runyon v. Koster, 14 Pet. 122; Martin v. Mobile, & O. R. R. Co., 7 Bush, 635; Re Comstock, 3 Sawy. 218; Frazier v. Wilcox, 4 Rob. La. 518; Bard v. Poole, 12 N. Y. 495; Diamond Match Co. v. Powers, 51 Mich. 145; 6 N. 314. By virtue of Revision N. J., sec. 50, p. 186, the courts will order the books of a company incorporated under the laws of that state, but keeping its books out of the state, brought into the state for inspection by stockholders, when the stock has depreciated, and the stockholders are desirous of knowing the exact condition of the company, and on failure to do so will declare its charter forfeited. Huyler v. Craigin Cattle Co., 40 N. J. Eq. 392; 2 A. 274.

2 A corporation was created by act of the legislature of Pennsylvania and empowered by its charter to do business anywhere except in the state of Pensylvania. It was also provided that "It shall be lawful for the company to establish the necessary offices for the business of the company wherever their business is located and to have their principal office in the United States in such place as they may deem expedient; at which place it shall be lawful to hold all meetings for the transactions of the business of the company." After doing business on an extensive scale in the state of Kansas and keeping its main office there for a number of years, its authority to do business by virtue of the comity of the latter state came in question before its courts in an action on municipal bonds executed and delivered to it. It was held that no comity due or existing required the state of Kansas to recognize the corporate existence or powers of such foreign corporation. Land Grant Ry., etc., Co. v. Coffee County, 6 Kan. 256. Acts Tex., 1885, p. 59, which repealed Rev. St. 1879, art. 566, subd. 27, authorizing the organization of mercantile corporations, is a direct prohibition

Nor can a foreign corporation do away by contract with the provisions of statutes regulating and fixing conditions upon which it is permitted to do business in a state.[1]

§ 82. **Comity a part of the law of the land.**—Still since the law of comity is founded upon reasons of interest and convenience, an intent to disregard it must clearly appear in order to deprive a corporation of its benefits. By it corporations, like natural persons, are permitted to extend their dealings into other states than that in which they are chartered. "If the policy of a state or territory does not permit the business of the foreign corporation in its limits or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations or allowing corporations to be formed only by general law."[2]

§ 83. **The charter alone is consulted for authority in another state.**—The powers conferred in the charter or articles of incorporation are consulted to determine the

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against the operation of such corporations in Texas, and the rule of comity does not extend so far as to render valid the charter of such a corporation obtained in another state for the sole purpose of doing business in Texas. Affirming 1 S. W. 200. Empire Mills v. Alston Grocery Co., (Tex.) 15 S. W. 505. See also Smith v. Alvord, 63 Barb. N. Y. 423; Com. v. N. Y. L. E. & W. R. Co., 114 Pa. St. 340; 7 A. 756; State v. Milwaukee, etc., Ry. Co., 43 Wis. 579; Hanna v. International Petroleum Co., 23 Ohio St. 622; Runyan v. Koster's Lessee, 14 Pet. 130; Second Nat. Bank v. Lovell, 2 Cin. (Ohio) 400; Newburg Petroleum Co. v. Weare, 27 Ohio St. 352; Hill v. Beach, 12 N. J. Eq. 31; Merrick v. Van Santvoord, 34 N. Y. 222; Merrick v. Brainard, 38 Barb. 574. But the conveyance of real estate to a foreign corporation which the law does not permit it to hold is not void upon collateral attack. It may hold and enjoy the same subject to the Commonwealth's right of escheat. Hickory Farm Oil Co. v. Buf. N. Y. & P. R. Co., 32 F. 22. See also Com. v. N. Y. L. E. & W. Co., 114 Pa. St. 340; 7 A. 756; Carlow v. C. Aultman & Co. (Neb.), 44 N. W. 873.

[1] Fletcher v. N. Y., etc., Ins. Co., 13 Fed. Rep. 526. See also Daly v. Nat., etc., Ins. Co., 64 Ind. 1, holding that the same principle applies to a corporation chartered by the federal government.

[2] Cowell v. S. Springs Co., 100 U. S. 59, 60, per Field, J.

legality of corporate acts in a state, other than that creating the corporation. While the general legislation of such state has no extra-territorial application, yet it affects the legality of the acts of the corporation if the same are legal in the state where performed. Though an act be expressly prohibited in the charter of a corporation where formed, yet it may be upheld in another sovereignty if not contrary to the laws of the latter.[1]

And a foreign corporation may charge the legal rate of interest in a state where it does business though the rate would be illegal and usurious in the state of its creation.[2]

If although the laws of the state where the charter was granted render the corporation liable in an action by the representatives of a person whose death it has caused, yet no liability will attach in another state where no means of redress for such act are provided.[3]

§ 84. Corporations not entitled to rights and immunities as citizens.—The constitutional provision securing to citizens of each state all the immunities and privileges of citizens in the several states was not intended to in-

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[1] Thus where in a charter granted in Illinois the corporation was prohibited from disposing of its bonds at less than eighty cents on the dollar, it was held that such prohibition did not prevent it from disposing of its bonds at less rate in the State of New York. Such prohibitions were considered in the latter state as mere restrictions upon the powers of the officers and agents of corporations. Ellsworth v. St. Louis, etc., Ry. Co., 98 N. Y. 553.

The same principle has been applied to devises prohibited in the state granting the charter but lawful in the state where made, White v. Howard, 38 Conn. 342; Fellows v. Miner, 119 Mass. 541. See Baker v. Clarke Institution, 110 Mass. 88; Ould v. Washington Hospital, 95 U. S. 313. As to the capacity of an insolvent corporation to take a transfer of property where the laws of the place of creation and of the transaction were different; Hoyt v. Sheldon, 3 Bosw. 267; 299. See also Hoyt v. Thompson, 5 N. Y. 320, 353; s. c. 19 N. Y. 208; Ohio Life Ins. Co. v. Merchants' Ins., etc., Co., 11 Hump. 324.

[2] Bard v. Poole, 12 N. Y. 495; Hitchcock v. United States Bank, 7 Ala. 386, 433. See Miller v. Tiffany, 1 Wall, 310; Depau v. Humphreys, 20 Mart. La. 1; Bullard v. Thompson, 35 Tex. 318.

[3] Crowley v. Panama, R. R. Co., 30 Barb. 99.

clude corporations under the term citizens.[1] Such a construction would have the effect of conferring upon each state the power of disposing of the franchise of acting in a corporate capacity within the jurisdiction of other states. Such a power would enable one state by the creation and transfer of "legal institutions" to entirely subvert the objects of legislation in a sister state and substitute its own.[2]

§ 85. **Property rights are protected.**—But this principle only applies to foreign corporations seeking to enjoy the rights and benefits of citizenship beyond the limits of the states creating them. It has come to be well settled that with respect to property rights no discrimination can be made between corporations and natural persons.[3]

The shareholders of a corporation are not necessarily citizens of any state; and even if they were there is a marked distinction between a discrimination against the members and against the corporation itself. It cannot be said that a law of a state discriminating against a corporation chartered by another state discriminates against the individual citizens of such state. It would merely be a modification, limitation or abrogation of the comity previously existing between the two states with respect to the extra-territorial effect of charters of incorporation. Special privileges, such as the enjoyment of a corporate franchise, enjoyed by citizens in their own state, are not secured under the constitutional provision under consideration in other states. The privileges intended to

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1 Norfolk W. & R. Co. v. Conn., 136 U. S. 114; 10 S. C. 958. See also Cummings v. Wings, 31 S. C. 427; Cole v. Cunningham, 133 U. S. 107; 10 S. C. 269.

2 Phil. Fire Asso. v. New York, 119 U. S. 110; Pembina Cons. S. M. & M. Co. v. Penn. 125 U. S. 181.

3 Minneapolis & W. L. R. Co. v. Herrick, 127 U. S. 210; Missouri Pac. R. Co. v. Mackey, Id. 205; Minn. & St. P. R. Co. v. Beckwith, 129 U. S. 26; Santa Clara County v. Sou. Pac. R. Co., 118 U. S. 394, 396; Pembina Min. Co. v. Penn., 125 U. S. 181.

be secured by it are those common to all citizens in any given state under its constitution and laws by virtue of their being citizens.[1]

§ 86. **Foreign corporations may be excluded.**—Since a state has the right to exclude foreign corporations entirely from the exercise of corporate powers or the transaction of business within her boundaries, and the means by which she causes such exclusion or the motives thereof are not subjects for judicial inquiry,—[2]

§ 87. **Policy of exclusion need not be expressed.**—The intent of a state to exclude foreign corporations from the transaction of business within its borders need not be expressed directly, but may be inferred from its general policy and legislation. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy or are considered as injurious to its interests, the presumption in favor of the adoption of such comity can no longer be drawn.[3]

§ 88. **State may impose conditions.**—It necessarily

[1] Paul v. Virginia, 8 Wall, 168.

[2] Doyle v. Continental Ins. Co., 94 U. S. 535; Blair v. Perpetual Ins. Co., 10 Mo. 564. A subsequent revocation of license granted to a foreign corporation to do business within the state does not deprive it of property without due process of law. Hartford F. Ins. Co. v. Raymond, 70 Mich. 485; 38 N. W. 473. Compare N. O. & M. Packet Co. v. James, 32 F. 21, holding that foreign corporation cannot be excluded from the right to do business in Louisiana.

[3] Carroll v. City of East St. Louis, 67 Ill. 568; Bank of Augusta v. Earle, 13 Pet. 592; Runyan v. Koster's Lessee, 14 Pet. 122, 130; Myers v. Manhattan Bank, 20 Ohio, 301, 302; B'k of Marietta v. Pindall, 2 Rand. 473; Rees v. Conococheague B'k, 5 Rand. 326; Starkweather v. American Bible Soc., 72 Ill. 50; United States Mortgage Co. v. Gross, 93 Ill. 483, 493; Christian Union v. Yount, 101 U. S. 353. In Carnall v. E. St. Louis, 67 Ill. 568, a foreign corporation had been incorporated in Connecticut whose sole business was the buying and selling of land. It was held that such business was contrary to the general policy of the state of Illinois because tending to create monopolies, and acquisition of land by it would not be permitted. To same effect is U. S. Trust Co. v. Lee, 73 Ill. 142. But such rule was held not to prevent a foreign corporation from loaning money on real estate security. U. S. Mfg. Co. v. Gross, 93 Ill. 483.

follows that a state may impose conditions not in conflict with the constitution or laws of the United States to the transaction of business within its territory by companies chartered by other states, or having given a license it may revoke or alter it with or without cause.[1]

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[1] Phil. Fire Asso. v. N. Y., 119 U. S. 110; People v. Fire Ass'n, 92 N. Y. 311; Goldsmith v. Home Ins. Co., 62 Ga. 379; Lafayette Ins. Co. v. French, 18 How. 407; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall. 410; s. c. 48 Ill. 172; Woodward v. Com. (Ky.), 7 S. W. 613; Phœnix Ins. Co. v. Commonwealth, 5 Bush, Ky. 68; State v. Fosdick, 21 La. Ann. 434; State v. L. L. & G. Ins. Co., 40 La. Ann. 463; 4 So. 504; State v. S. C. & N. R. Co., 43 Minn. 17; Western Union Tel. Co. v. Mayor, 28 Ohio St. 539, 540; Home Ins. Co. v. Davis, 29 Mich. 238; Pembina, etc., Co. v. Com., 125 U. S. 181; 8 S. Ct. 737; Slaughter v. Commonwealth, 13 Gratt. 767; Tatem v. Wright, 3 Zab. 429; Fire Department v. Noble, 3 E. D. Smith, 449; State v. Benn, (N. J.) 19 A. 665.

Acts Tenn., 1875, c. 109, and Acts Tenn., 1887, c. 187, provide that no foreign insurance company shall do business in the state unless it has "at least $200,000 of paid-up actual cash capital, of which $100,000 shall be invested in bonds of the United States, or some one or more of the states." A purely mutual fire insurance company cannot be licensed to do business in the state, though it has in its advance premium fund more than $200,000, of which $100,000 is invested in United States bonds, and the commissioner of insurance may be satisfied that the company is entirely solvent. Mutual Fire Ins. Co. v. House, (Tenn.) 14 S. W. 927.

Const. Ala., art. 14, § 4, prohibiting a foreign corporation from doing business in the state, without having an agent and known place of business in the state, was not intended to interfere with interstate commerce, and does not prevent a foreign corporation from selling a merchant of the state goods to be shipped into the state. Ware v. Hamilton-Brown Shoe Co. (Ala.), 9 So. 136.

Rev. Code, Ala., § 1180, prohibiting the agent of a foreign insurance company to take any risk or transact any business of insurance in the state, without first procuring a certificate of authority from the auditor, does not prohibit the transaction of business not in the line of insurance, and a bill, therefore, to foreclose a mortgage in favor of a foreign insurance corporation, which merely shows a debt owing to the company, for which security was given, is not demurrable for failing to show a compliance with the statute. Boulware v. Davis (Ala.), 8 So. 84. See also Nelms v. Edinburgh-American Land Mortg. Co., of New England (Ala.), 9 So. 141; Mortg. Security Co. v. Ingram (Ala.), 9 So. 140.

A foreign insurance company which issues to its agents in Louisiana commissions authorizing them to receive proposals for insurance, to fix premiums and receive the same, and to countersign, issue, renew and consent to the transfer of policies signed by the president and secretary, and which has made the deposit, and appointed an agent to receive services of process, required as conditions precedent to the business of insurance by the laws of Louisiana, is doing business within the state, within Act La. 101 of 1886, imposing licenses on insurance companies. State v. New England Mut. Ins. Co. (La.), 8 So. 888.

It was held that where the owner of a plantation situated in Louisiana applies for a loan in another state to the agent of a foreign corporation, and the

But it has been recently held that a state cannot in its constitution impose as a consequence of failure to provide a known place of business within the state a total exclusion from the right to do business within the state, such provision being considered an interference with interstate commerce when applied to common carriers.[1]

A state may provide as a condition precedent to the transaction of business by a foreign corporation the filing with a state officer of a stipulation not to remove suits brought against it into the federal courts, and a violation of such law will justify a revocation of the license to do business.[2]

But an agreement to this effect cannot be specifically enforced nor pleaded in bar of a petition for the removal of a cause to a United States Court, because the contract itself is unconstitutional and void.[3]

A common requirement is that a designation of an officer or agent upon whom service of process may be had shall be filed in a public office in the county where

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notes and mortgage, though executed in Louisiana, are delivered and made payable in such other state, the transaction is not a violation of Const. La., Art. 236, providing that "no foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in this state upon whom process may be served." Reeves v. Harper (La.), 9 So. 104; Maxwell v. Reeves, Id.

A single purchase of machinery within the state by a foreign corporation to be carried to and set up in the state of its domicile does not constitute doing business within the state. Colo. I. W. v. S. G. Min. Co. (Colo.), 25 P. 325.

1 N. O. & M. Packet Co. v. James, 32 F. 21.

2 Doyle v. Continental Ins. Co., 94 U. S. 537, overruling the circuit court; Hartford Fire Ins. Co. v. Doyle, 6 Biss. 461. A statute imposing as a condition to the right to do business within the state that no actions shall be removed or brought in federal courts, does not affect the right of the foreign corporation to sue in the state court though an action has been previously brought for the same cause in a federal court. N. W. Mut. L. Ins. Co. v. Brown, 36 Minn. 108; 31 N. W. 54. See Goodrel v. Kreichbaum, 70 Ia. 362; 30 N. W. 872.

3 Insurance Co. v. Morse, 20 Wall. 445; Barron v. Burnsides, 121 U. S. 186; Chicago M. & St. P. R. Co. v. Becker, 32 F. 849; Lafayette Ins. Co. v. French, 18 How. 404, 407; Ducat v. Chicago, 10 Wall. 410; St. Clair v. Cox, 106 U. S. 350, 356; Phil. Fire Ass'n v. N. Y., 119 U. S. 110, 120. Contra, Home Ins. Co. v. Davis, 29 Mich. 238.

it has its principal place of business and sometimes, in such office in each county in the state where it has a resident agent and with the secretary of state or some other state officer.[1] An appointment under such statute holds good until a new appointment is made.[2] But the right of the foreign corporation to sue and be sued in the federal courts is not affected by the appointment of an agent under such statute.[3] Nor is the right to serve in the ordinary way provided by statute taken away by failure to file the appointment when the corporation has engaged in transacting business in the state.[4] A judgment obtained by such service cannot be impeached in another state.[5] No express assent to statutory regulations and conditions is necessary. Assent will be presumed.[6] A charter provision in conflict with local provisions will be disregarded.[7]

§ 89. **How contracts are affected by failure to comply with conditions precedent.**—The effect of statutes imposing conditions precedent upon the contracts of foreign

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[1] Goodwin v. Colorado, etc., Co., 110 U. S. 1; Gibbs v. Queen's Ins. Co., 63 N. Y. 114; Leonard v. Washburn, 100 Mass. 251; Morton v. Mutual Ins. Co., 105 Mass. 141; Thayer v. Tyler, 76 Mass. 164; Nat., etc., Ins. Co. v. Pursell, 92 Mass. 231; Gillespie v. Commercial, etc., Ins. Co., 78 Mass. 201.

[2] Gibson v. Mfgrs., etc., Co., 144 Mass. 81; 10 N. E. 729.

[3] Stevens v. Phœnix Ins. Co., 41 N. Y. 149; Gray v. Quicksilver Min. Co., 21 Fed. Rep. 288.

[4] Ehrman v. Teutonia Ins. Co., 1 McCrary, 123. See also Colo. I. W. v. S. G. Min. Co. (Colo.). 25 P. 325.

[5] Lafayette Ins. Co. v. French, 18 How. 404; Moch v. Virginia, etc., Ins. Co., 10 Fed. Rep. 696.

[6] Lafayette Ins. Co. v. French, 18 How. 404.

[7] Cin. Mut., etc., Co. v. Rosenthal, 55 Ill. 85; State v. Lathrop, 10 La. Ann. 398. See also Leonard v. Washburn, 100 Mass. 251; Thayer v. Tyler, 76 Mass. 164; Nat., etc., Ins. Co. v. Pursell, 92 Mass. 231; Morton v. Mutual Ins. Co., 105 Mass. 141; Gillespie v. Commercial, etc., Ins. Co., 78 Mass. 201. A single act does not constitute the doing of business within a state. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727. Nor does the making and performing contracts through domestic companies. People v. Am. Bell Tel. Co., 117 N. Y. 241; 22 N. E. 1057; Com. v. Same, 129 Pa. St. 217; 18 A. 122, where the question of the power of the state to tax foreign corporations doing business was involved.

corporations made without compliance with the conditions imposed is a question upon which litigation frequently arises. There is a distinction in this respect between disabling and prohibitory provisions. In the case of the former the validity of their acts and contracts cannot be collaterally attacked; the state alone can object. If, however, the language of the constitutional provision or statute be clearly prohibitory or if it impose a penalty for violations, then contracts made without previous compliance with the conditions imposed are void and unenforceable by the corporation whether expressly declared to be so or not.[1]

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[1] Dudley v. Collier, 87 Ala. 431; 6 So. 304; Woods v. Armstrong, 54 Ala. 150; Robertson v. Hays, 83 Ala. 290; 3 So. 674; Farrior v. U. S. Co., 88 Ala. 275; 7 So. 200; Christian v. Am. F. L. & M. Co., 89 Ala. 198; 7 So. 427; Melchon v. McCarty, 11 Am. Rep. 605; Prescott v. Battersby, 119 Mass. 285; Thorne v. Traveller's Insurance Co., 80 Pa. St. 15; Cincinnati Assur. Co. v. Rosenthal, 55 Ill. 85; Ætna Ins. Co. v. Harvey, 11 Wis. 394; Hoffman v. Banks, 41 Ind. 1; Un. Cent. L. Ins. Co. v. Thomas, 46 Ind. 44; Bank v. Page, 6 Cr. 431; In re Comstock, 3 Sawy. C. C. 218; Sample v. Bank, 5 Ind. 88; Williams v. Cheney, 3 Gray, 215; Jones v. Smith, Id. 500. The case of Dudley v. Collier, *supra*, was under an act of 1887, which expressly made it unlawful for a foreign corporation to do business without, etc., and imposed a penalty for a violation of the provision. But in a case arising under the constitutional provision which existed prior to the act of 1887, containing a simple prohibition, it was held in the federal court that the contract, a mortgage of real estate, was not void but only voidable. Am. L. & T. Co. v. E. & W. R. Co., 37 Fed. Rep. 242.

In another case it was held that where a contract of insurance is made and the policies issued in another state, it cannot be objected that the company has not complied with the laws relating to foreign insurance companies doing business within the state where suit is brought. Marine Ins. Co. v. St. Louis I. M. & S. Ry. Co., 41 F. 643. A statute which forbids, under a penalty, any foreign insurance company to do business in that state unless it has a certain amount of capital stock, and has obtained from the insurance commissioners a certificate that it has complied with certain requirements, but which imposes no duty or prohibition on persons receiving policies from companies which have not complied with the law, does not render void a policy issued in violation thereof. Pennypacker v. Capital Ins. Co., 80 Iowa, 56; 45 N. W. 408. See also Conn. River Mut. Fire Ins. Co. v. Way, 62 N. H. 622; Resenhouse v. Seeley, 72 Mich. 603; 40 N. W. 765; Hartford Fire Ins. Co. v. Raymond, 70 Mich. 485.

Foreign corporations may be required to file with the secretary of state or territory in which it is carrying on business a copy of its articles of incorporation duly authenticated. Hammer v. Garfield Min. & M. Co., 130 U. S. 291.

It is well settled that the corporation cannot itself take advantage of its non-compliance with such conditions.[1]

§ 90. Constitutional rights distinguished from rights by comity.—Independent of its franchises and corporate privileges, which may be recognized or not as suits the convenience and will in each state in the exercise of the law of comity, there are constitutional rights which belong to corporations and to individuals alike, and which can be claimed in every state irrespective of the place of creation or citizenship. The exercise of a franchise may be absolutely refused, but rights guaranteed by the constitution of the United States must be respected by every state as a matter of duty and not merely of comity.

When a foreign corporation is required to file in the office of the secretary of state a statement in writing designating a place of business in the state as a condition precedent to the right to do business therein, an authorized agent of a foreign corporation which had not complied was denied the right to recover compensation from the borrower for services in securing a loan. Dudley v. Collier, 87 Ala. 431.

Under a constitutional provision of Colorado denying foreign corporations the right to acquire and hold real estate until compliance with such conditions, it was held that a conveyance to a foreign corporation which had not complied was void, and that it might be collaterally attacked by a private person. Fritts v. Palmer, 10 Sup. Ct. Rep. 93. See also Utley v. Mining Co., 4 Colo. 369; Bank v. Matthews, 98 U. S. 621, 627; Bank v. Whitney, 103 U. S. 99, 103; Swope v. Leffingwell, 105 U. S. 3; Reynolds v. Bank, 112 U. S. 405, 412; Smith v. Sheeley, 12 Wall. 358, 361; Meyers v. Croft, 13 Wall. 295; Joues v. Indemnity Co., 101 U. S. 622, 628; Fortier v. Bank, 112 U. S. 439, 451; Toledo Tile & L. Co. v. Thomas, 33 W. Va. 556; 11 S. E. 37. Compare Sprague v. Cutler & S. L. Co., 106 Ind. 242; 6 N. E. 335; Marine Ins. Co. v. St. L., etc., Co., 41 F. 643.

The failure of a foreign corporation to comply with the requirement of the Montana statute that all foreign corporations before doing any business within the territory shall file with the secretary thereof, etc., was held not to preclude it from suing to recover taxes paid under protest and alleged to have been illegal, such action not being based upon any act or contract of plaintiff in the conduct of its business. Powder Riv. Cattle Co. v. Custer County, 9 Mont. 145; 22 Pac. Rep. 383.

[1] Tabor v. Gross & P. Mfg. Co., 11 Colo. 419; 18 P. 537; Singer Mfg. Co. v. Hardee, 4 N. W. 175; 16 P. 605; Kilgore v. Smith, 122 Pa. St. 48; 15 A. 698; Brooklyn L. Ins. Co. v. Bledsoe, 52 Ala. 538; Fritts v. Palmer, 10 S. Ct. 93; Am. L. & I. Co. v. E. & W. R. Co., 37 F. 242; Gull River L. Co. v. Keefe (Dak.), 41 N. W. 743; Hull v. Ins. Co., 79 Ga. 93; 3 S. E. 903.

A state law directed against foreign corporations cannot impair contracts or deprive them of their property, without due process of law, nor levy a tax upon them which amounts to an interference with interstate commerce.[1]

A statute which abolishes the rule of comity and refuses a recognition of foreign corporations has the effect of converting the corporators who have as an association exercised the forbidden corporate power into a copartnership of individuals; and thus although the corporation could not as such protect its contracts, property or rights, the members of the company would be under no such disability.[2]

While the corporate entity is not a citizen in the same sense that natural persons are, and is therefore incapable of protecting the constitutional rights and immunities guaranteed to citizens, the individual members or shareholders who compose it are undoubtedly citizens of the United States and of their respective states, and entitled to all constitutional rights as such. For this reason the constitutional rights of a corporation can best be understood and determined by regarding it in its true light as an association of individuals rather than in its legal sense as a corporate entity.[3]

§ 91. **Corporations chartered in two or more states.**—A corporation created by the joint act of different states is treated as a domestic corporation in each state under whose laws it is authorized. Its rights and duties are no greater or less than if it were in each state a different corporation of the same name; and the relations of such

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[1] Erie Ry. Co. v. State, 31 N. J. L. 531. See Diamond Match Co. v. Roeber, 106 N. Y. 473; 13 N. E. 419.

[2] Erie Ry. Co. v. State, supra; State of Indiana v. Am. Express Co., 7 Biss. 230.

[3] Infra, ch. xxii.

constituent corporations are governed by the same rule. Their corporate existence is not merged, but there is created only a unity of stock and interest.[1] But it is held that the consolidation of foreign and domestic corporations creates a domestic corporation;[2] and that in such case the act of the legislature of the state of the foreign corporation confirming its *ultra vires* acts does not validate them.[3]

A corporation chartered by concurrent act of two or more states is considered a citizen of each.[4] If sued in one of the chartering states it cannot move the case to the federal courts on the ground of residence in the other.[5] Consequently a judgment against it in one of the states is conclusive upon it in the other or others.[6]

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[1] Farnum v. Blackstone Canal Corp., 1 Summ. 46. See also Quincy Bridge Co. v. Adams County, 88 Ill. 615; Covington, etc., Bridge Co. v. Mayer, 31 O. St. 317.

[2] Matter of Sage, 70 N. Y. 220. See also Chicago R. R. Co. v. Minn., etc., R. R. Co., 29 Fed. Rep. 337; Sprague v. Hartford & Providence R. R. Co., 5 R. I. 233.

[3] State v. North Central R. R. Co., 18 Md. 193; Fisk v. Chicago R. I. & Pac. R. R. Co., 4 Abb. Pr. N. S. 378. The same view is taken in the federal courts. Mullen v. Downs, 94 U. S. 445. See also Clark v. Barnard, 108 U. S. 436; Blackburn v. Selma M. & M. R. R. Co., 2 Flip. 525. It was held that by complying with the laws of Nebraska as to filing charter, etc., a foreign corporation became domestic; Stout v. Sioux City, etc., R. R. Co., 8 Fed. Rep. 794. Contra, Chicago, etc., R. R. Co. v. Minn., etc., R. R. Co., 29 Fed. Rep. 337. But not by the purchase of a railroad in that state. Chicago, etc., R. R. Co. v. Dakota Co., 28 Fed. Rep. 219. Nor does the mere authorizing a foreign corporation to do business in the state, make it domestic. County Court v. Baltimore & O. R. R. Co., 35 Fed. Rep. 161; Baltimore & O. R. R. Co. v. Ford, 35 Fed. Rep. 170.

[4] Quincy, etc., Bridge Co. v. County of Adams, 88 Ill. 615; Graham v. Boston, etc., R. R. Co., 118 U. S. 161, 168; Nashua & L. R. R. Co. v. Boston & L. R. R. Co. 19 Fed. Rep. 50; Ohio & Miss. Ry. Co. v. Wheeler, 1 Black 286; Horne v. Boston & M. R. R. Co., 18 Fed. Rep. 50.

[5] Union Trust Co. v. Rochester, etc., R. R. Co., 29 Fed. Rep. 609.

[6] Re United States Rolling Stock Co., 57 How. Pr. 16.

CHAPTER VI.

POWER TO CONSOLIDATE WITH OTHER CORPORATIONS.

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§ 92. **Definitions and distinctions.**—There is amalgamation or consolidation of one corporation with another when by consent of its members it effects a complete transfer of all its property, interests and franchises to and becomes completely merged in it, or in the creation of a new corporate entity by the consolidation of two or more corporations, which thereby abandon their original organizations and franchises, and transfer all their rights and interests to the new. It has sometimes been attempted to define and explain amalgamation and consolidation as a result of distinct proceedings. The

result of merger of one corporation into another, however effected, is an amalgamation, and the same term may properly be applied to the result of two or more corporations, consolidating to form a new one, though the result is generally designated in the United States as a consolidation and in England as an amalgamation. The union of two or more corporations may be likened to either the welding of two or more malleable substances so as to form a distinct third, or of one into another whereby the latter retains its name and form, notwithstanding it has received an accession to and change of its substance and nature by the merger of the substance welded into it. Virtually and practically, the terms amalgamation and consolidation may be applied interchangeably.[1]

§ 93. **Results involved.**—The operation, when fully carried out, involves four distinct operations: 1. A destruction of the entity of one or both the original corporations; 2. A transfer of corporate rights and liabilities; 3. A transmutation of the members of one corporation into another or of the original corporations into a new one; 4. Usually, a novation between the creditors of the original corporations and a substitution of the new one as debtor.

§ 94. **Legislative sanction necessary.**—A transfer of franchises or special privileges cannot be effected without express legislative sanction.[2] The result is accom-

[1] In Dongan's case, 28 L. T. N. S. 60, the court say:—"Two companies may be united, either by fusion into a third or by one absorbing the other. The former process seems to correspond most nearly with the popular sense of the word amalgamation, and I believe nobody really knows what amalgamation means. Whatever be the process, no shareholders in the company which it destroys, or of which it suspends the life, can become a shareholder in the other company without his personal assent." For another definition see In re Empire Ass. Co., L. R. 4 Eq. 341.

[2] Rhymney R. R. Co. v. Taff Vale R. R. Co., 30 L. J. Ch. 482; West London R. R. Co. v. London & Northwestern R. R. Co., 11 C. B. 327; Winch v. Birken-

plished by compliance with the conditions and formalities contained in the legislative enactment or with the terms provided in the constating instruments or unanimously agreed upon by the members. But the prescribed methods must be strictly pursued whether contained in statutes or other instruments,[1] and no member of either consolidating corporation can be bound by the proceeding without his consent thereto, somehow expressed.[2] Such statutes in so far as the right to consolidate is sought under them are strictly construed. Parallel railroads cannot consolidate under a statute authorizing the consolidation of connecting lines.[3] But when the right is plainly derivable from the statute, a liberal construction will be given to effectuate the objects intended by the consolidation. Power to consolidate stock gives power to purchase and sell; and power to construct implies power to purchase.[4]

§ 95. **Power in constating instruments.**—But if the constating instruments or general law contain a provision authorizing a consolidation with another company, this places the power in the hands of the majority to effect

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head, etc., R. R. Co., 7 Rail. Cas. 334; Northern R. R. Co. v. Eastern Counties R. R. Co., 21 L. J. 837; London & Southwestern R. R. Co. v. Southeastern R. R. Co., 8 Ex. 584. See Johnson v. Shrewsbury, etc., R. R. Co., 3 De G. M. & G. 914.

1 Brown v. Dibble, 65 Mich. 520; 32 N. W. 656.

2 Clinch v. Financial Corp. L. R., 4 Eq. 341; Bagshaw ex parte L. R., 4 Eq. 341; Hort's Case, 1 Ch. D. 307; Bank of Hindostan v. Alison L. R., 6 C. P. 54, 222; Harman's Case, ib. 326; Doman's Case, ib., 21; In re Irrigation Co. of France, L. R., 6 Ch. 176.

3 State v. Vanderbilt, 37 O. St. 590. See also Peoria, etc., R. R. Co. v. Coal Valley Co., 68 Ill. 489.

4 Branch v. Jessup, 106 U. S. 468. But power to sell to a corporation does not contain power to sell to an individual. Bird v. Bird's, etc., Sewerage Co., L. R., 9 Ch. 358. See generally Hamilton Ins. Co. v. Hobart, 68 Mass. 543; Smith v. St. Louis, etc., Ins. Co., 2 Tenn. Ch. 727; Gardner v. Hamilton, etc., Ins. Co., 34 N. Y. 420; Currier v. Concord R. R. Co., 48 N. H. 321; Rivington's Case, L. R., 3 Ch. D. 10; Doman's Case, L. R., 3 Ch. D. 21; Wynne's Case, L. R., 8 Ch. 1002.

a consolidation which will be binding on all the members.[1]

§ 96. **Any member may prevent.**—But it is also well settled that corporations already formed without the existence of such statutory provisions, or express agreement at the time of their formation, cannot be consolidated without unanimous consent of their members, even though the legislature should authorize the consolidation to be made ; for it would, if allowed, work a fundamental change in the contracts of membership.[2] Without the consent of every member given through the charter or otherwise, an attempt to effect a consolidation by a majority vote is wholly nugatory, and a single dissenting member may, by objecting, prevent the proposed change.[3]

§ 97. **Rights of shareholders upon consolidation.**—Where a naked power of consolidation is given by law, the parties to it may adjust the terms of consolidation with respect to the rights and liabilities of shareholders and creditors of each by agreement. Thus shares in one company may be issued in exchange for those in another, thus making the shareholders in one company the owners of all the shares in the other. Or if it is desirable to preserve the legal identity of both companies, the united shareholders in both companies may be regarded as shareholders in each corporation, both corporations, however, acting under similar charters and under the same management. Corporations originally chartered by different states are often thus united under

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[1] Nugent v. Superiors, 19 Wall. 241.

[2] Tuttle v. Michigan Air Line R. R. Co., 35 Mich. 247; Botts v. Simpsonville Tp. Co. (Ky.), 10 S. W. 134; Mowrey v. Indianapolis, etc., R. R. Co., 4 Biss. 78, 83; Clearwater v. Meredith, 1 Wall. 25, 40.

[3] Lauman v. Lebanon, etc., R. R. Co., 30 Pa. St. 46; Black v. Delaware, etc., Canal Co., 24 N. J. Eq. 467; Knoxville v. Knoxville, etc., R. R. Co., 22 Fed. Rep. 758; Botts v. Simpsonville Tp. Co. (Ky.), 10 S. W. 134.

legislative acts in each state into a single corporation. The new company by such means becomes invested with all the rights and duties of a corporation in both states.[1]

And the new corporation in these cases is an aggregation of the interest of all the shareholders in the several corporations out of which it is formed.

§ 98. **Succession of one corporation to property and rights of another.**—The same object is attained by a corporation transferring all its property, funds, rights, liabilities to another, and then voluntarily dissolving itself as by amalgamation ; but there is an obvious legal difference in the means employed.[2]

Such arrangements are matters of internal management, consequently their validity and binding obligation upon dissenting members must be determined in each instance by the constating instruments. Probably in every case express powers in this behalf are necessary in order that a corporation may itself enter into such arrangements, and bind its members without their concurrent assent thereto.[3]

§ 99. **Consolidation of several companies.**—When sev-

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[1] Racine, etc., R. R. Co. v. Farmers' L. & T. Co., 49 Ill. 349, 350; Quincy Bridge Co. v. Adams County, 88 Ill. 619; Phil., etc., R. R. Co. v. Maryland, 10 How. 376; Mead v. New York, etc., R. Co., 45 Conn. 199; Eaton, etc., R. R. Co. v. Hunt, 20 Ind. 459; Gardner v. James, 5 R. I. 235; Maryland v. Northern Central Ry. Co., 18 Md. 193.

[2] In re United Ports & Genl. Ins. Co. L. R., 8 Ch. 1002; Perrett's Case, L. R. 15 Eq. 250.

[3] Green's Brice's *Ultra Vires*, 2 Am. Ed. 614. Under articles of amalgamation and consolidation in which each original company granted to the new "all its property real and personal and mixed of every kind and description . . . contracts, agreements, claims . . . and all rights, privileges, franchises corporate, and otherwise, held, owned or claimed by said parties of several parts in possession or in expectancy either in law or in equity . . . it was held that land granted by the government to the companies by an act declaring the purposes for which it was granted passed to the new company." Tarpey v. Deseret Salt Co. (Utah), 17 P., 631.

eral corporations unite to form a new one; there is an implied transfer to it of the entire interests and all the effects of the original companies. There is also an implied undertaking on the part of the new organizations which it has succeeded. But in order that the new corporation may exercise the franchises of the old ones, it must have legislative sanction or authority for the purpose.[1]

§ **100. Subsequent sanction effectual.**—But a consolidation effected without previous authority of law may be rendered effectual and the new institution vested with the franchises of its constituents by subsequent legislation. Franchises, unlike property, cannot be transferred by agreement between the parties, however formal the transaction and whatever the consideration. They can be derived only through the legislature. "When the consolidation was completed, the old corporations were destroyed, a new one was created, and its powers were 'granted' to it, in all respects, in the view of the law, as if the old companies had never existed, and neither of them had ever enjoyed the franchises so conferred."[2]

§ **101. Equivalent to formation of new company.**—The aggregation resulting from the consolidation of several companies does not differ in any respect, from other corporations in its constitution and nature and in the rules of law governing the construction and exercise of its powers.[3]

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1 Pearce v. Madison, etc., R. R. Co., 21 How. 442; Aspinwall v. Ohio, etc., R. R. Co., 20 Ind. 492; Clearwater v. Meredith, 1 Wall. 25; State v. Bailey, 16 Ind. 51.

2 Shields v. Ohio, 95 U. S. 319, per Swayne, J.

3 Shields v. Ohio, 95 U. S. 319. See Centr. Tr. Co. v. St. L. A. T. R. Co., 41 F. 551; Backus v. Ry. Co., 71 Mich. 645; 39 N. W. 469; Prov. C. Co. v. Prov. & W. R. Co., 15 R. I. 303; 4 A. 394. Where railroad corporations consolidate, the articles of consolidation constitute the new articles of incorporation, and the persons therein named to act as directors are such until successors are

The terms upon which the members of the original corporations agree to associate in the new are generally to be gathered from several instruments instead of one as before. But the franchises which they are to enjoy in the united company are derived wholly from the general law or act authorizing the consolidation. It may describe the rights, powers and franchises of the new body in terms, or, as is most usually the case, it may refer to the charters of the old companies and expressly incorporate their provisions.

§ 102. **Whether consolidating corporations are dissolved.**—Dissolution of the original corporations does not necessarily result from their consolidation. Whether such dissolution occurs will depend in each case upon the legislative intent manifested in the act or general law under which the consolidation takes place. In Central R. R. & Banking Co. v. Georgia,[1] Justice Strong said: "True, where three corporations had consolidated under an act of the legislature, authorizing them to merge and consolidate their stock and make one joint company, it was said that the effect of the act, and the terms of consolidation under it, was a dissolution of the three corporations, and at the same instant the creation of a new corporation, with property, liabilities and stock-

elected. St. Cal. 1861; Civil Code Cal., sec. 473. California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59; 7 P. 123. Pursuant to state authority, recognized by and made a part of the congressional grant of March 3, 1871, the Southern Pac. R. R. Co., April 15, 1871, filed amended articles of incorporation; and August 12, 1873, filed, together with the S. P. Branch R. R. Co., articles of amalgamation and consolidation, under the name of the S. P. R. R. Co. *Held*, that while in one sense a new corporation was formed, each was substantially and practically the same S. P. R. R. Co., mentioned in the acts of Congress, and was so recognized by Congress, and that the articles of amendment, amalgamation and consolidation were authorized by congressional as well as by state legislation. United States v. Southern Pac. R. Co., 45 F. 596; Same v. Colton Marble & Lime Co., Id.

[1] 92 U. S. 665, referring to McMahan v. Morrison, 16 Ind. 172, and Clearwater v. Meredith, 1 Wall. 40.

holders, derived from those then passing out of existence."

But the consolidation of separate corporations under general laws does not, at any rate, work an absolute cessation of their existence and powers for any and all purposes. A court of equity will, for purposes of convenience and justice, consider such corporations still in existence and possessed of certain powers. Thus it was held that the transfer of the assets to a new company might be specifically decreed according to the terms of consolidation against the officers of one of the composite companies.[1]

Temporary suspension of operations and non-user of

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[1] Edison Electric, etc., Co. v. New Haven Electric Co., 21 Abb. N. Cas. 119. In Kohl v. Lillienthal, 81 Cal. 378; 20 P. 401; 22 P. 689, two mining companies compromised existing disputes and vexatious litigations by the formation of a new corporation in which they became the principal shareholders, and to which each conveyed most of its property. It was held that the original companies were not thereby dissolved and that they could not be dissolved except by the judgment of the superior court, upon proceedings instituted and conducted to that end as provided by statute. But under the Georgia and Ohio statute a different view is taken. Railroad Co. v. Georgia, 98 U. S. 359; Atlanta, etc., R. Co. v. State, 63 Ga. 483. See also Eaton v. Hamilton R. Co., 20 Ind. 457; State v. Bailey, 16 Ind. 46; McMahon v. Morrison, 16 Ind. 172; Clearwater v. Meredith, 1 Wall. 25, 40; Powell v. North Missouri R. R. Co., 42 Mo. 63, etc.; New Orleans, etc., Co. v. Louisiana, etc., 11 Fed. Rep. 277; Charity Hospital v. New Orleans, etc., Co. (La.), 4 So. 433; Ohio, etc., Ry. Co. v. People, 120 Ill. 200; 14 N. E. Rep. 874.

The effect upon the franchises differs in case of consolidation from that of a sale. In the former case all the franchises of the consolidating corporations are merged in the new. In Boardman v. Lake Shore, etc., Ry. Co., 84 N. Y. 157, 181, the Court say:—"It is held that where two railroads are consolidated, as far as one of the creditors of one of the original companies is concerned, the consolidated company is the successor of the old company; but in respect to the properties of the other companies it is a new and independent company, and such creditor has no claim against it upon their original contract, but only by virtue of its assumption of the obligations of the old companies." In Fee v. Gas Co., 35 La. An. 413, the Court say:—"The articles of consolidation and the legislative act by authority of which they were executed evidently present a case of complete and perfect amalgamation, the effect of which was, under American authorities, to terminate the existence of the original corporations, to create a new corporation, to transmute the members of the former into members of the latter, and to operate a transfer of the property, rights and liabilities of each old company to the new one." See also Green County v. Commrs., 109 U. S. 104.

franchises during a supposed consolidation subsequently held by the courts illegal and void do not destroy or forfeit the corporate existence of either of the companies or affect its title to corporate property.[1]

§ 103. What rights and franchises pass to consolidated company.—It is usually provided in the law authorizing a consolidation, that the new company shall be invested with all the rights and privileges previously enjoyed by the consolidated companies. But the franchises when acquired by the new company and adapted to its constitution, are not the same though they are similar to those enjoyed by the original corporations.[2] The new company having been duly constituted, it stands upon the same footing as other corporations, and enjoys the same right to exercise both its express powers and the incidental powers usually implied. And the extent of such powers and the manner of their exercise by the original companies is a proper measure of authority for the new.[3] Upon the consolidation of a domestic with a foreign railroad corporation it was held that the new company acquired a privilege to receive subscriptions to the domestic company, made by a township, and that the issue of bonds by the township to the new company

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1 State v. Crawfordsville, etc., Co., 102 Ind. 283; 1 N. E. 395.

2 Railroad Co. v. Maine, 96 U. S. 509. Under Ga. statutes, in order to give a consolidated railroad corporation the right to acquire and hold lands granted in aid of the construction of the lines of both of two constituent companies, these lines must bear such relation to each other that when completed they may admit of the passage of trains over two or more of such lines continuously. Ga. Pac. Ry. Co. v. Wilks, 86 Ala. 478; 6 So. 34. See also Norwich & W. R. Co. v. Worcester, 147 Mass. 518; 18 N. E. 409. In Cushman v. Brownlee, (Ind. 1891), 27 N. E. 560, it was held that when a railroad company consolidates with another, title to its land vests in the latter.

3 Tomlinson v. Branch, 15 Wall. 460; Powell v. North Missouri R. R. Co., 42 Mo. 63; Green County v. Conness, 109 U. S. 104; Zimmer v. State, 30 Ark. 680. See Rogers v. Oxford, etc. Ry. Co., 2 De G. & J. 662, per Mr. Justice Erle; Chicago, St. P. & K. C. Ry. Co. v. K. C., St. J. & C. B. R. Co., 38 F. 58; Ga. Pac. R. Co. v. Wilks, 86 Ala. 478; Norwich & W. Co. v. Worcester, 147 Mass. 518.

was lawful.[1] A corporation by the same name may be chartered by two states, clothed with the same powers and duties in both states; but it will be two distinct corporations one in each state with only such corporate powers in each state as are conferred by its creation in that state.[2] But while consolidating corporations of two states are to be taken as one, yet that one has no legal existence in either state except by the laws of that state.[3]

Among the franchises, property and rights which have been held to pass to a railroad company formed by the consolidation of several companies are that of taking land to build its road;[4] of receiving a grant from the government provided by act passed before consolidation;[5] of mortgaging its road;[6] of charging a

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[1] Livingston County v. Portsmouth First Nat. Bk., 128 U. S. 102. See also Nugent v. Supervisors, 19 Wall. 241; County of Scotland v. Thomas, 94 U. S. 682; Town of E. Lincoln v. Davenport, 94 U. S., 801; Wilson v. Salamanco, 99 U. S. 504; Empire v. Darlington, 101 U. S. 87; Menasha v. Hazard, 102 U. S. 81; Harter v. Kemochen, 103 U. S. 562; County of Tipton v. Locomotive Works 103 U. S. 523.

[2] Reece v. Newport News & M. V. Co., 32 W. Va. 164; 9 S. E. 212; Farmers' Loan & Trust Co. v. Trust Co., 21 Abb. N. C. 104; 1 N. Y. S. 44; Central Tr. Co. v. St. L., A. & T. Ry. Co., 41 F. 551. See also A. Backus v. Ry. Co., 71 Mich. 645; 40 N. W. 604.

[3] Pittsburg & Sh. R. Co's Appeal (Pa.), 4 A. 385. In Fitzgerald v. Missouri Pac. Ry. Co., 45 F. 813 (April, 1891), it was held that in the conduct of its corporate business the consolidated corporation acts as a unit,—as one corporation, and not three; and, in the absence of a statutory provision to the contrary, it may transact its corporate business in one state for all, and the contracts it enters into and the liabilities it incurs in one state are binding upon it in all the states, and may be enforced against it in any one of them, when the action is transitory. But it was further held that such corporation is not the same in each state. While it is a unit, and acts as a whole in the transaction of its corporate business, it is not a corporation at large, nor is it a joint corporation of the three states. Like all corporations, it must have a legal dwelling-place, and it dwells in three states, and is a separate and single entity in each. It is, in effect, a corporate trinity, having no citizenship of its own distinct from its constituent members, but a citizenship identical with each.

[4] South Carolina R. R. Co. v. Blake, 9 Rich. 233.

[5] Tarpey v. Deseret Salt Co. (Utah), 17 P. 631.

[6] Mead v. New York & R. R. Co., 45 Conn. 109.

fixed rate for transportation;[1] of an exemption of the officers and servants of the companies from jury duty.[2]

§ 104. **Effect upon exemption from taxation.**—Where the charter of one of the original companies exempts its property from taxation, such exemption cannot be extended to any other property acquired by the consolidated company by the consolidation or to any subsequently acquired; but the property to which the exemption applied would still be exempt.[3]

§ 105. **Construction of authority to consolidate.**—The true construction of laws granting to corporations the right of consolidation subordinates such right to all the general laws in force at the time of consolidation.[4] And a provision of law or in a charter or in articles of association authorizing a consolidation and transfer of rights, franchise and property, to the new organization, refers to those owned and possessed at the time of consolidation and to no others.[5]

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1 Fisher v. New York Central, etc., R. R. Co., 46 N. Y. 644.

2 Zimmer v. State, 30 Ark. 680.

3 Phil., etc., R. R. Co. v. Maryland, 10 How. 376; Branch v. City of Charleston, 92 U. S. 677; Tomlinson v. Branch, 15 Wall. 460; City of Charleston v. Branch, Id. 470; Central R. R. Co. v. Georgia, Id. 665; Chesapeake, etc., R. R. Co. v. Virginia, 94 U. S. 718.

4 A new corporation resulting from consolidation under statutes authorizing and consenting to its organization is not subject to a constitutional provision previously adopted, providing "a majority of the directors of any railroad corporation now incorporated or hereafter to be incorporated, by the laws of this state, shall be citizens and residents of this state." O. & M. Ry. Co. v. People, 120 Ill. 200; 14 N. E. 874.

5 An interesting and instructive exposition of the law on this subject is found in the decision of the Supreme Court of the United States in St. Louis, etc., R. R. Co. v. Berry, 113 U. S. 475. It came up on a writ of error to review the action of the Supreme Court of Arkansas in refusing to restrain officers of that state from levying a tax on property of plaintiff in error.

The charter granted by the state of Arkansas to one of the two consolidating companies contained a provision authorizing it to consolidate with other companies. Another provision exempted the road and all the property of the company from taxation. The company receiving this charter at length consolidated with the St. Louis Iron M. & S. R. R. Co.; but before the consolidation and

§ 106. **Effect of consolidation upon municipal agreements to take stock.**—A county authorized by law to subscribe for shares in a railroad company which is afterwards consolidated with another company is entitled to subscribe for shares in the new company in place of the original.[1]

But when it is proposed that a county shall take stock in a company, and the law requires a proposition to that effect to be approved by a two-thirds vote of the qualified voters, and after such vote is taken the company consolidates with another company, there must be a new submission and a new adoption of the proposed subscription before it can be made in the new company resulting from such consolidation.[2] But where by the same act authorizing a city to lend its credit to each of two railroad companies, power to consolidate their roads was given to the companies, it was held that the city might exercise the power so given it as well after such consolidation as before.[3] The

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after receiving its charter, the state of Arkansas adopted a new constitution in which provisions were inserted that all corporation laws passed thereafter should be subject to a reserved power of alteration and repeal, and that "the property of corporations now existing or hereafter created shall forever be subject to taxation the same as property of individuals."

The exact question to be determined by the court was, whether the consolidated company was entitled to the exemption from taxation on the property of the Cairo and Fulton Railroad Company which it acquired by the consolidation. or whether the consolidation was the formation of a new corporation, subject to the then existing laws and incapable of acquiring property to which was attached an exemption in conflict with the organic law as it then existed. It was decided that the exemption was not acquired by the new company.

1 Scotland County v. Thomas, 94 U. S. 682.

2 Harshman v. Bates, 92 U. S. 569; Mansfield, etc., R. R. Co. v. Drinker, 30 Mich. 124.

3 Robertson v. Rockford, 21 Ill. 451. See also New Buffalo v. Iron Co., 105 U. S. 73; Town of East Lincoln v. Davenport, 94 U. S. 801; Livingston County v. Portsmouth B'k, 128 U. S. 102; Bates Co. v. Winters, 97 U. S. 83; Wilson v. Salamanca, 99 Id. 499; Empire v. Darlington, 101 Id. 87; Vernon v. Hovey, 52 Ind. 563; County of Tipton v. Locomotive Works, 103 U. S. 523; State v. Green Co., 54 Mo. 540. See also Nugent v. Supervisors, 19 Wall. 241; County of Henry v. Nicolay, 95 U. S. 619. The last case cited being a suit upon municipal bonds by an assignee of the corporation, the validity of the bonds

general rule is that if the change effected by a consolidation is such that an individual stockholder is thereby released, the same effect is produced upon a municipal subscription.[1]

§ 107. Consolidation considered with respect to the rights of third parties.—Duties which a corporation owes to parties who have dealt with it previous to a consolidation, and obligations it has incurred to such parties under contracts, cannot be transferred to the new corporation without their consent. The effect of the exercise of such a power would be to impair the obligation of contracts; and therefore it cannot be conferred by the legislature.[2]

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in the hands of such assignee was upheld. See also County of Schuyler v. Thomas, 98 U. S. 169. Harshman v. Bates County, 92 U. S. 569; Cantillon v. Dubuque, etc., R. R. Co. (Ia.), 35 New Rep. 620.

[1] Lynch v. Eastern, etc., R. R. Co., 57 Wis. 430. See Atchison, etc., R. R. Co. v. Phillips Co., 25 Kans. 261; Society, etc., v. New London, 29 Conn. 174; Chickaming v. Carpenter, 106 U. S. 663; Lewis v. Clarenden, 5 Dillon, 329; Commonwealth v. Pittsburg, 41 Penn. St. 278. Where the purposes for which the corporation receiving municipal aid in the form of bonds could not have been carried out without consolidation with another company the existing statutory provision therefore became a part of the contract with the township, and the issuance of bonds to the consolidated company was valid. Livingston County v. First Nat. Bank, 9 S. Ct. 18. See also Merrill v. Marshall Co., 74 Ia. 24; 436 N. W. 778. Compare Board of Commissioners v. State (Ind.), 64; 17 N. E. 855; Cantillon v. Dubuque & N. W. R. Co. (Iowa), 35 N. W. 620.

[2] Bruffet v. Gt. Western R. R. Co., 25 Ill. 353. In re Manchester, etc., Loan Ass'n L. R., 9 Eq. 643; In re National Provident Life Ass'n Co., L. R., 9 Eq. 306; In re Family Endowment Ass'n, L. R., 5 Ch. 118.

In a case where an agreement had been entered into by a party to lend a sum of money to a corporation and to accept its bonds for the same, and such corporation afterwards consolidated with others, it was held that the consolidated company could not, after a tender of its bonds, maintain an action upon the agreement. The view which the court took of the respective rights of the parties was thus expressed: "The defendant had a right to stipulate for the bonds of a particular company, and it is clear he cannot be required to accept, in lieu of the promised consideration, the obligation of any other company, no matter how much the latter may exceed in value the former. There is no legal mode in which the contract of a man can be improved for him against his consent. As the bond of the contracting company formed the entire consideration for the promise of the defendant, if such company has put it out of its power to render such bond to the defendant, it has destroyed this contract by its own vol-

But while the rights and remedies of creditors of a consolidating corporation remain intact, it must not be understood that their consent is necessary to the act of consolidation. It is sufficient that the property of the debtor corporation remains subject to their demands and its shareholders are still answerable to the extent of their statutory liability.[1] In such case the new company may recover indemnity from the old.[2]

§ **108. Substitution and novation necessary.**—It is only meant to say that the consolidating corporation cannot be substituted as their debtor without a novation. To illustrate, if A and B, partners, are indebted to C, they may consolidate their business with another firm, and the new firm may be substituted for the firm of A and B as C's debtor. But C's refusal to accept the new firm does not defeat the contract by which the new copartnership is formed, nor does it release A or B or the assets of their copartnership from C's debt. Accordingly it is held that the consent of creditors to a consolidation is not necessary unless the circumstances of the transfer of its property by a corporation of that kind is calculated to defraud them. It is true in the case of a corporation, as in that of a natural person, that any conveyance of the property of the debtor without authority of law and in fraud of existing creditors, is void as against them.[3]

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untary act, and has in consequence discharged the defendant." N. J. Midland R. R. Co. v. Strait, 35 N. J. (6 Vroom), 322.

[1] State v. Green County, 54 Mo. 540; County of Henry v. Nicolay, 95 U. S. 619; Scotland v. Thomas, 94 U. S. 682; Chesapeake & Ohio R. R. Co. v. Virginia, Ib. 718; Peoria & Rock Island R. R. Co. v. Coal Valley Mining Co., 68 Ill. 489. The right of creditors who have not consented to a consolidation to follow the property of a debtor corporation into the hands of the new company is well settled. See Railroad v. Rollins, 82 N. C. 523; Marshall v. Western, etc., R. R. Co., 92 N. C. 322; Young v. Rollins, 35 Id. 485. Infra, § 709 et seq.

[2] Miller v. Lancaster, 5 Caldw. Tenn. 514. See Paine v. L. E., etc., R. Co., 31 Ind. 283.

[3] Wabash, etc., R. R. Co. v. Ham, 114 U. S. 593. See G. C. & S. F. Ry. Co. v. Morris, 67 Tex. 692; 4 S. W. 156; Shaw v. Norfolk Co. R. R., 16 Gray, 407;

It is usually provided by statute that the consolidated company shall become liable for the debts and obligations of the original corporations. Since even in that case the new corporation cannot be substituted for the original debtor, without the creditor's consent, the legislature may authorize a substitution and novation on terms less favorable to the creditor than before existed, and he will, by consenting to the substitution, accept the terms and conditions thus imposed.[1]

§ 109. **Assumption of liabilities by new company.**—It is usual, however, in arrangements for a consolidation, to make satisfactory provisions for the payment of the

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Western Un. R. Co. v. Smith, 75 Ill. 496; Prouty v. Lake Shore, etc., R. R. Co., 52 N. Y. 363; Selma, Rome, etc., R. R. Co. v. Harbin, 40 Ga. 706; Houston, etc., R. R. Co. v. Shirley, 54 Tex. 125; Vilas v. Page, 106 N. Y. 439; 13 N. E. 743; Warren v. Mobile, etc., R. R. Co., 49 Ala. 582; Welsh v. First Div. of the St. Paul, etc., R. Co., 25 Minn. 314.

[1] Deposit B'k v. Barrett (Ky.), 13 S. W. 337. But where a consolidation was made under statutory authority on the basis of equality between the shares of the two corporations and plaintiff held bonds issued by one of the corporations convertible into its stocks on completion of its road, it was held that they were entitled to demand stock in the new corporation, as for the purposes of this contract the old corporation continued under the new name. Day v. W. N. & R. R. Co., 151 Mass. 302; 23 N. E. 824. The N. Y. Stat. 1869, C. 917, sec. 5, gives right of action against an original corporation after its consolidation. Gale v. Troy & B. R. Co., 51 Hun, 470; 4 N. Y. S. 295. A statute consolidating two corporations provided that the new corporation should "be subject to all the duties, restrictions, obligations, debts, and liabilities to which, at the time of the union, either of said corporations is subject," and that "all claims and contracts . . . against either corporation may be enforced by suit or action . . . against the" new corporation. The consolidation was made on the basis of equality between the shares of the two corporations. Plaintiffs held bonds, issued by one of the corporations, convertible into its stock on completion of its road. It was held that they were entitled to demand stock in the new corporation, as for the purposes of this contract the old corporation continued under the new name. India Mut. Ins. Co. v. Worcester, N. & R. R. Co. (Mass.), 25 N. E. 975; Sweet v. Same, Id.

Laws N. Y. 1869, c. 917, § 5, authorizing the consolidation of railroad companies, and providing that all debts and liabilities of either company, except mortgages, shall attach to the new corporation and be enforced against it and its property to the same extent as if created by it, allow an action against the new company on bonds and coupons of one of the former companies, though they are secured by a mortgage on the property of the original debtor corporation. Affirming, 3 N. Y. S. 327. Ruger, C. J., and Earl and Finch, JJ., dissenting. Polhemus v. Fitchburg R. Co., 123 N. Y. 502; 26 N. E. 31.

debts of the respective companies.[1] The acceptance of the arrangement and of the resulting corporation for the original debtor may be evidenced as well by conduct and acquiescence as by express agreement.[2]

However, until there is some manifestation of assent on the part of the creditor, the consolidated corporation is under no obligation to consider itself the principal debtor. And it is sometimes a task of construction to determine from the act authorizing the consolidation or from the terms of the mutual agreement respecting creditors, whether prior debts are assumed by the new company.[3]

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[1] As in Columbus, etc., R. R. Co. v. Powell, 40 Ind. 37; Indianola R. R. v. Fryer, 56 Tex. 609; Indianopolis, etc., R. R. Co. v. Jones, 24 Ind. 465; Louisville, etc., R. R. Co. v. Boney, 117 Id. 501; 20 N. E. Rep. 432; Montgomery, etc., R. R. Co. v. Boring, 51 Ga. 582; Thompson v. Abbott, 61 Mo. 176.

[2] In Morgan v. Overman S. M. Co., 37 Cal. 534 two corporations had compromised litigation pending between them by the defendant company in the action transferring all its property to plaintiff company, whereupon the latter assumed all the debts of both. A creditor of the defendant corporation sued plaintiff without previous express acceptance of plaintiff in lieu of defendant as his debtor. It was held that the bringing of the suit was of itself sufficient evidence of acceptance by the creditor of the terms of the compromise. See also Fleming v. Alter, 7 Searg. 294; Vilas v. Page, 106 N. Y. 439; 13 N. E. 743; Gay v. Thompson, 1 Johns. Ch. 32; Dearborn v. Park, 5 Me. 81; Felton v. Dickinson, 10 Mass. 289; Schemetham v. Vanderheyden, 1 Johns. 139; Jackson v. Pearce, 10 Johns. 413; Arnold v. Lyman, 17 Mass. 404.

[3] Upon the consolidation of three railroad companies under act of the legislature, it was provided that all the property of each of the companies thus united should become vested in the new corporation subject to the rights, demands, liens, etc., of creditors whose right to resort to the property thus vested for satisfaction of their claims was thus preserved; and that "all the franchises, property, powers, and privileges now enjoyed by, and all of the restrictions, liabilities and obligations imposed upon, said corporations by virtue of their respective charters, shall appertain to said united corporations, in the same manner as if the same had been contained in or acquired under an original charter." It was held that the new corporation was not bound primarily to pay the debts of the original corporations and that the new company might purchase outstanding bonds of the old companies and hold them like other creditors, or pay and extinguish them, thereby relieving the property held by it. Shaw v. Norfolk R. R. Co., 16 Gray, 407. See Indianopolis R. R. Co. v. Fryer, 56 Texas, 609; People v. Empire Mut. Life Ins. Co., 92 N. Y. 105; Deposit B'k v. Barrett (Ky.), 13 S. W. 337. No doubt the corporation would have been held liable in this case as a trustee if the action had been brought in proper form to so change it.

The liability of the new corporation in the absence of an express agreement has often been asserted.[1]

And nearly as often denied.[2]

§ **110. Consolidation under general statutes.**—Very few states have provided by general law for the consolidation of all corporations; but most of them have prescribed how railroad corporations, and, in some instances, other corporations may consolidate.[3]

§ **111. Irregular consolidation.**—But even without express authority under general provisions, for forming corporations, there is nothing to prevent two corporations wishing to unite their business, abandoning their original enterprises by unanimous consent of their respective members, and filing new articles of association. The same object is effected by one corporation that wishes to join another transferring all its property and business to the latter and continuing to carry out its purposes under the name of the latter.[4]

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1 Prouty v. Lake Shore, etc., Ry. Co., 52 N. Y. 363; Chase v. Vanderbilt, 37 N. Y. Sup. Ct. 334; Shaw v. Norfolk County R. R. Co., 16 Gray, Mass. 407; Powell v. North Mo. R. R. Co., 42 Mo. 63; Town of Plainview v. W. & St. P. R. Co., 36 Minn. 505; 32 N. W. 745. Compare Selma, etc., R. R. Co. v. Harbin, 40 Ga. 709; Montgomery, etc., R. R. Co. v. Boring, 51 Ga. 582; Bruffett v. Gt. Western R. R. Co., 25 Ill. 357; Boardman v. Lake Shore, etc., Ry. Co., 84 N. Y. 157.

2 Thompson v. Abbott, 61 Mo. 177; Indianapolis & R. Co. v. Jones, 29 Ind. 465. See Columbus & Ry. Co. v. Powell, 40 Ind. 40; Mt. Pleasant v. Beckwith, 100 U. S. 514.

3 Though statutory authority exist for a consolidation, and two or three or more corporations agree to consolidate, there can be no valid consolidation of two if the third afterwards refuses to enter the corporation without a new agreement between the two. See Gould v. Seney, 9 N. Y. S. 818; 7 Ry. & Corp. L. 143. It is not important as affecting complete valid consolidation that the new corporation has failed to comply with a provision of general law requiring each company to file with the secretary of state a resolution accepting the provisions of the act if they have complied with all the other important provisions, such provisions being merely directory. Leavenworth Co. v. C. R. I. & P. Ry. Co., 134 U. S. 688; 10 S. Ct. 708.

4 This method of effectively transferring the franchises and property of a corporation to another without literal legality is thus described by an English author. "A corporation is an existence, owing all its qualities, powers and

And if the corporation to which it accedes does not possess the requisite powers under its charter or articles, the statute furnishes the fullest facilities for amendment. However, no such transfer and combination can be effected with less than unanimous consent of the members, and the claims of creditors will in no case be allowed to be defeated or jeopardized by such transactions.[1]

capacities to the law. The law which calls it into being has also appointed the manner in which its existence shall be determined, but it has not been said that it may commit civil suicide. In whatever mode, by surrender or forfeiture of charter, by winding up, etc., a corporation be ended, it is found that the law, i.e., the state, intervenes. A corporation is something distinct from its members; all these may leave it, yet it still exists. How, then, is it possible that any action of theirs, unrecognized by the law, can destroy that which depends for its origin and continuance on the law alone? But though a corporation cannot directly put an end to its existence, and merge it, by any process of amalgamation, in that of another, yet it may accomplish this in an indirect and circuitous manner. It may do so by transferring its property, funds, rights and liabilities to the other contracting corporation, and then voluntarily dissolving itself, usually by winding up. Generally, the arrangement is supplemented by a proviso, whereby the transferee, the purchasing company, indemnifies the selling company against the liabilities which it may be under in respect of claims, existing or prospective. This, after all, is not an amalgamation. It is not a union of one corporation with another, but is simply a transfer of assets, with attendant responsibilities. It is, however, a sufficient amalgamation for all practical purposes." Green's Brice's Ultra Vires, 2d Am. Ed., 608.

[1] The case of Miners Ditch Co. v. Zellerback, 37 Cal. 543, is a case in which two water companies had abandoned their respective organizations, formed a new corporation under a new name and conveyed all their property to it. The right of the plaintiff to enter into an arrangement for such a complete transfer of property as was put in evidence in that case was not directly in dispute, as the decision turned on a question of implied authority in the officers of the corporation. It is clear, however, that the uniting of property rights merely by two or more corporations under new articles and a new name does not involve a sale of the franchise. But unless assented to by every shareholder it would be a diversion of funds for unauthorized purposes, and would entitle single dissenting shareholders to an injunction to restrain and prevent. But as appears elsewhere, a transfer of the entire corporate property and even a consolidation, may be provided for in the articles under general laws or in the charter. Supra, § 94.

CHAPTER VII.

COMBINATION WITHOUT CONSOLIDATION—LEGAL RESTRICTIONS.

§ 112. Scarcity of definitions.—The question, What is a trust? in the offensive or illegal sense, cannot be answered with a satisfactory definition, and few legal principles applicable to the subject are, as yet, clearly established.[1] It may be said, in a general way, that

[1] Illegal combinations known as "trusts" have come so recently, have assumed so many shapes, and have been employed in so many departments of industry and commercial enterprise, and have multiplied so rapidly, that the jurisprudence of the country has not, as yet, had time to formulate new rules by which they may be reached and controlled. Although numerous cases have been passed upon by the courts, after able arguments and expositions by counsel, they fail to furnish the profession any new principles of general application. Consequently it is difficult to lay down any general rules as an unerring guide to the legal mind in deciding under what circumstances a so-called "trust" would be amenable to the process of a court to redress a public grievance arising from its character as such. Although no set phrase or regular formula by which to define a "trust" has been accepted or agreed upon, yet all have a general understanding that it is some form of combination among capitalists to destroy com-

when individuals conspire or come to a common understanding, and unite their capital for an unlawful purpose, their agreement is void; but every such statement involves the assumption of an unlawful purpose, and thus deprives it of any definitive or descriptive value.[1]

§ 113. The term does not apply in all cases of combination.—A combination of capital and effort in pursuance of a mutual agreement by a number of individuals or corporations is neither unlawful nor immoral in itself, although the result of carrying out the agreement be the destruction or exclusion of competition.[2] If it were, interstate railroads could seldom be built, except in violation of law, and many other great undertakings of lesser magni-

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petition and increase the profits in any particular trade or industry. And the notion also prevails in the public if not the professional mind, that such a combination is necessarily inimical to public interests.

1 The popular theory that every unification of several individuals or corporate enterprises brought about to secure immunity from injurious competition is *per se* hostile to common right and prejudicial to public welfare may be correct when asserted concerning a majority of "trusts," but its correctness is not sufficiently universal to establish the affirmation as a rule. The methods by which that form of "trusts" is formed by the combination of several corporations, where shares are issued to represent the constituent interests, are thus stated by a congressional committee in a report to congress, on the Standard Oil and other "trusts." "There exist a certain number of corporations organized under the laws of the different states and subject to their control. These corporations have issued their stock to various individuals, and these individual stockholders have surrendered their stock to the trustees named in the agreements creating these trusts, and accepted in lieu thereof certificates issued by the trustees named therein. The agreements provide that the various corporations whose stock is surrendered to the trustees shall preserve their identity and carry on their business." 4 Ry. & Corp. L. J. 98.

2 A contract between rival and competing railway companies made for the purpose of preventing competition, but not for the purpose of raising the prices of transportation above a reasonable standard, is not void as against public policy. Manchester & L. R. R. v. Concord R. R., (N. H.) 20 A. 383; holding also that Act N. H., July 5, 1867, forbidding the consolidation of competing railways renders illegal any contracts whereby the road-bed, rolling stock, and equipments of one competing line is to be operated and controlled by another. Street railways, though parallel, cannot be "competing" in the sense of the mischief intended to be prevented, and a statutory prohibition relative to the consolidation of parallel and competing railways does not apply to them. Appeal of Montgomery (Pa.), 20 A. 399.

tude would fail or not be attempted. The character of ownership of railroads and many local enterprises is necessarily monopolistic. Moreover, they are usually carried on by combinations of individual or corporate capital. And yet they are not only tolerated but encouraged, and sometimes subsidized by nations, states and municipalities.

§ **114. The purpose difficult of ascertainment.**—If the real purpose were always, or even generally, the ostensible purpose, there would be but little difficulty in dealing with illegal trusts. Suppose, for illustration, the members of corporations engaged in the steel rail industry form a new corporation to engage in the same business done by the original corporations, and the transaction presented no other phases. The best evidence of their intentions, and generally the only available evidence, would be their articles of association, which would disclose nothing unlawful. Suppose it could be proven that the method by which the business was to be made successful was for the aggregate membership of each consolidating corporation to take a proportionate share of interest and of profits and all become subject to a common management so as to reduce the expenses, and, by thus escaping each other's competition, increase profits. There surely is nothing unlawful in the monopolistic sense either in providing economical management or in securing profitable business. Such arrangement may, however, subject the combining corporations to *quo warranto* proceedings on the ground that their acts are *ultra vires*, as we shall see further on.

If the law authorized a court to prevent two or more individuals from consolidating their business in order to increase their profits, the same law would compel them to continue business in separate establishments, after such business had ceased to be profitable, or prevent

them from disposing of their stock and fixtures to a rival establishment. By so doing, it would inflict upon them a loss of their investments, because, forsooth, the public welfare required that there should be competition.[1]

And if a court cannot do the latter neither can it decide what consideration the parties shall accept, whether a fixed sum or an interest in the new establishment. The remunerative employment of capital is the object of much legislation; and the co-operation of different members of society in the investment of capital is the incitive policy which justifies the legalizing of corporate bodies.

But a different rule applies to corporations owing duties of a strictly public nature. To buy up the stock of a rival gas company is not a "lawful purpose" for which a corporation may be formed. Its essential result is the creation of a monopoly.[2] And though corporations owe no public duties, if the palpable and only object of the transaction is the suppression of competition, which result is sought not by absorbing the property of a rival company, but by suspending its operations for a time or indefinitely, it will be deemed an

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1 In Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206; 6 So. 41, it was held that a contract by which one of the companies bound itself not to handle plow stocks and blades in the territory including and north of Birmingham, Ala., in competition with or in opposition to the other, was reasonable and valid. See also Hubbard v. Miller, 27 Mich. 15; Curtis v. Gokey, 68 N. Y. 300; Warfield v. Booth, 33 Md. 63; Dethlifs v. Townsend, 7 Daly, 354; Beal v. Chase, 31 Mich. 490; Morse Machine Co. v. Morse, 103 Mass. 73; O. S. Nav. Co. v. Winsor, 20 Wall. 64.

2 People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798; holding that a corporation cannot be formed "to purchase and hold or sell the capital stock of any gas or electric company in Chicago or elsewhere in Ill.," because the accomplishment of such object would tend to create a monopoly. State v. Nebraska Distilling Co. (Neb.), 46 N. W. 155; Richardson v. Buhl, 77 Mich. 632; 43 N. W. 1102; Pittsburg Carbon Co. v. McMillan, 23 Abb. N. C. 298; 6 N. Y. S. 433; People v. Refining Co., 54 Hun, 354; 7 N. Y. S. 406; Langdon v. Branch, 37 Fed. Rep. 449. See also Gould v. Head, 38 Fed. 886; Gibbs v. Consol. Gas Co., 130 U. S. 396. Compare Leslie v. Lorillard, 110 N. Y. 519; 18 N. E. 363.

illegal combination subjecting charters of the offending corporations to forfeiture.[1]

§ 115. A "trust," "forestalling" and "cornering," distinguished.—The principles appertaining to the common law offense of forestalling have frequently been referred to and attempts have been made to apply them to this modern invention; but there is really only a resemblance and no legal analogy between them. To forestall the market was only possible where the sources of supply and production were barely equal to the demand, and had reference to buying up in advance what others produced or were to produce, and by this means creating a scarcity and securing an advance price.[2]

"Corners" in the stock and produce markets are offenses similar to forestalling, but they are not the same. While the public are incidentally injured by them, the immediate victims and greatest sufferers are persons who have "sold short" after all the products or particular class of stocks have been bought into the pool or "cornered."[3]

The criminality of forestalling consisted as much in the fact that it took the community by surprise as that it created a monopoly. It was temporary in its effect

[1] State v. Nebraska Distilling Co., 77 Neb. 632; 46 N. W. 155; Am. Preservers' Trust Co. v. Taylor Mfg. Co., 46 F. 152. A court will not enforce such a contract as between the parties thereto. Richardson v. Buhl, 77 Mich. 632; Pittsburg Carbon Co. v. McMillan, 23 Abb. N. C. N. Y. 298; Gould v. Head, 38 F. 886. In a suit against a corporation formed by the consolidating of two gas companies brought about for the purpose of disabling one of them from competing with the other and of increasing the price of gas consumed in the city of Baltimore; the whole controversy turned on the legality or illegality of the combination. It was held that the arrangement thus brought about was illegal even if there were no statute prohibiting it, and that the consideration for the services performed partook of such illegality so that he could not recover. Gibbs v. Baltimore Gas Co., 130 U. S. 396.

[2] 2 Cooley's Bl. 159.

[3] "Corners" are fraudulent, illegal and void. Sampson v. Show, 101 Mass. 145; Raymond v. Leavitt, 40 Mich. 447; and any one injured by its being organized may recover in equity money exacted from him through its operations. Barry v. Croskey, 2 J. & H. 1.

and necessarily local in its operations, while the institutions we are considering must be successful, if at all, in the future, and by reason of their permanence.

Nor are "trusts" identical with middle-age monopolies, such as existed in the Elizabethan era as described by Lord Coke.[1]

§ 116. Legal supervision and control.—The attendant circumstances must be rare indeed which will give an individual suitor a standing in a court of law or equity on the sole ground that such a combination has been entered into. Constitutional provisions could generally be successfully invoked for the protection of the alleged wrongdoer. Any public wrong done by a trust, must be a wrong to the state, and any remedy must be one devised and enforced by virtue of state authority to enforce police regulations unless the aggrieving party be a corporation, and be guilty of an abuse of its franchises. The state may attach criminality and forfeiture of rights and privileges to the doing of almost any business or specific act; but as there are few kinds of business enterprise in which capital may not profitably combine under favorable circumstances, it would require more ingenuity and statesmanship than any legislator or body of legislators possesses to formulate a system of regulations on this subject which would not either fail of its objects from inherent weakness or work great inequality and injustice as well as public injury.

§ 117. Corporations offer facilities for organizing "trusts."—To the facts that the capital of corporations is usually represented by shares of stock having an ascertainable market value, and offering a permanent form of investment, which requires only slight personal

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[1] Case of the Monopolies, 11 Coke, 84.

supervision and attention by the owner, and that the stock furnishes a certain and convenient basis for calculating the separate interests, is attributable the frequency with which corporations become the integers in these trust arrangements. And because of the unchangeable nature of corporations and their freedom from accidents, to unexpectedly terminate their existence, which are the inseparable conditions of life of a natural person; the trust itself frequently assumes the shape, if not the legal *status*, of a corporation. But when so formed, it need not and generally does not present any phases or features not found in other corporations engaged in the same department of trade or industry. This similarity to ordinary corporate methods has presented insuperable obstacles in many cases in which it was sought to reach and deal with them.[1]

§ **118. Forms assumed.**—It may be safely asserted that all the trusts which have attracted attention in the United States have assumed one of three forms of organization:—1. The conveyance of the property and business of several corporations or individuals to an incorporated board of trustees, and the acceptance from it of shares in the common concern in return for the shares or interest in the uniting corporations or establishments

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[1] When a number of individuals associate themselves together, and become incorporated for the purpose of manufacturing or dealing in an article for gain, it is an inseparable incident of the power conferred by the charter or law under which they have become incorporated, that they shall employ all means which are not unlawful to carry out the objects of the incorporation, the real essence and finality of which is the realization of profits.

Law makers might specify certain acts and declare them to be unlawful and punishable or a ground of forfeiture of the corporate franchise. But if the acts so specified are the means best adapted to the successful exercise of the franchises of corporations, their charters would be self-defeating and inoperative to such an extent, that individuals would not care to become incorporated and incur the corresponding risk. The formation of corporations would consequently cease, and the accomplishment of projects requiring aggregations of capital would be no longer possible.

at an agreed valuation or proportion. 2. A similar conveyance to an individual or to several individuals, or to an existing corporation formed for the purpose, in trust, and a similar exchange and substitution of shares as in the first mentioned plan, except that in the latter case the "trust" becomes a partnership or common law joint-stock association or ordinary trust. 3. The organization of a combination by several corporations or individuals engaged in a particular line of business, by the terms of which one or more of their number is to either lease at a given rental or manage for a proportionate share of the profits all the establishments without decapitalization or substitution of shares of stock in the common concern for those of the constituent corporations.

The plan is sometimes varied to meet peculiar situations and requirements, but most of the combinations complained of by the public may be placed in one or the other of these classes.[1]

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1 "*Trusts" in form of corporation.* The American Loan & Trust Co., a car trust whose plan of operations was exhibited in the case of Ricker against the same, 140 Mass. 346, was a case of a corporation acting as a trustee of a car trust organized by corporations. It was held to be a partnership in the nature of a joint-stock company, and the trustee (the corporation) the legal owner of the partnership property.

The consolidated Rolling Stock Company of Conn., a corporation whose plan was shown in Mills v. Barb, 29 Fed. Rep. 410, was the result of a joint effort of several corporations engaged in manufacturing and furnishing cars to railroads. See also Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

Illustration of second class. The American Cotton Seed Oil Trust, which was the defendant in a proceeding by *quo warranto* brought by the State of Louisiana, was an instance of an unincorporated association of individuals becoming trustees of the uniting companies. State v. American Cotton Seed Oil Trust, 40 La. Am. 8; 1 Ry. & Corp. L. J. 509. The *modus operandi* of this enterprising institution is thus described in the petition embodied in the opinion:—"The petition alleges that the defendant association was formed about two years since in the city of New York, with a president, two vice-presidents, secretary and treasurer; that the agreement under which the said concern was organized, together with its by-laws, is kept a profound secret; that the trust is a gigantic monopoly formed for the purpose of acquiring and controlling the various cotton seed oil mills existing and operating in the different states of the South, for the purpose of depreciating the value and price of cotton seed and increasing the

§ 119. "Tying up" stocks.—There is still another form of combination which, from the fact that it suppresses opposition and seeks to succeed by combination of interests, resembles a "trust;" and from the fact that it seeks to temporarily "squeeze" the market resem-

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price of the products thereof, formed by process of manufacture; that the trust has within the past year acquired a majority of the stock in the several corporations organized and operating in this state, under the laws thereof, for the purpose of purchasing cotton seed, the manufacturing therefrom cotton seed oil, soap, oil-cake and other articles of commerce; that the trust acquired the majority of the stock in said corporations at a premium and advance thereon, and have elected directors and are controlling and operating said cotton-oil mills, the property of said corporation, solely for the interest and benefit of said illegal association; that in making said exchanges the said trust illegally fabricated, manufactured and issued certificates purporting to represent shares in the equity to the property held by the trustees of the American Oil Trust; that the trust monopoly has succeeded in reducing cotton seed from $14 per ton to $8 per ton, and in increasing seed products more than fifty per cent in price; that the trust has closed two mills in this state; that the trust, although a foreign association, carries on business in this state without having any place of business therein, or any known agent upon whom process may be served; that the trust has obtained no license or permit, has paid no taxes either to the state or city government, and is without right to carry on business in this state."

Illustrations of third class. The elements of a trust are scarcely perceptible in the third form of combine, and its objects, whether given publicity or not, are almost invariably to control and affect the market abnormally in the interest of the contracting parties. Such being the case there is no doubt of the illegality of the agreement as between the parties to it. But that fact is available only as a defense as between them, and affords no relief to the public, who are the principal sufferers from the unlawful combine. The decisions holding the illegality of trusts because in restraint of trade and against public policy have been principally cases arising out of the third form—suits between parties *in pari delicto.*

A fairly representative case is that of Santa Clara Val. M. & L. Co. v. Hays, 76 Cal. 387, 391; 18 Pac. Rep. It was an action to recover $10,000 for a breach of a contract entered into between plaintiff, a corporation, and defendants, who were engaged in the manufacture of lumber near Felton, in the county of Santa Cruz, whereby the latter agreed to make and deliver to the former, during the lumber year of 1881, 2,000,000 feet of lumber at $11 per thousand feet. Defendants agreed not to manufacture any lumber to be sold, during said period, in the counties of Monterey, San Benito, Santa Cruz or Santa Clara, except under the contract, and to pay plaintiff $20 per thousand feet for any lumber manufactured and sold to parties other than plaintiffs. Defendants failed to comply with the contract; hence the action. The court found that plaintiff was the owner of three saw-mills near Felton, and that various other parties were likewise owners of similar mills in the same vicinity; that for the purpose of limiting the supply of lumber, and increasing the price thereof, a plan was devised by which plaintiff was to lease all the mills for the year 1881 where such

bles a "corner," and yet is neither; or, if we choose to call it so, is either.

It consists in "tying up" the stock of a particular corporation for speculative purposes. Various schemes have been resorted to and devices employed for doing this. Sometimes "irrevocable" proxies are obtained

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lease could be obtained, and, where that could not be done, to contract with the parties owning mills and not willing to lease, by contracts similar to the one entered into with defendants; that, during the year 1881, plaintiff should shut down two of its own mills, and also as many of the mills by it leased as might seem necessary, in order to limit the supply of lumber in the four counties named; that this contemplated scheme was carried out, including the contract with defendants as a part thereof; that the sole and only object, purpose and consideration upon the part of plaintiff in entering into these contracts was to form a combination among all the manufacturers of lumbers at or near Felton for the sole purpose of increasing the price of lumber, limiting the amount to be manufactured, and giving plaintiff the control of all lumber manufactures near Felton for the year 1881, and the direct effect of this was no wholesale market for lumber at Felton, and dealers would not purchase in any considerable quantity during 1881.

The Supreme Court of California, affirming the decision of the lower court, held the contract void. A very similar case was that of Clancy v. The Onondaga Fine Salt Co., 62 Barb. 395, the only difference being that in the latter case the result of the "combine" was the formation of a corporation. In Craft v. McConoughy, 79 Ill. 346, the illegal combine was thus outlined by the court:— "The four firms, by a shrewd, deep-laid secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country. The action being by one of the firms against another for an accounting, relief was refused. After the North River Sugar Refining Company was dissolved, and its franchises forfeited by law, on account of its having become a party to an illegal combination, plaintiff was appointed a receiver, and brought suit, alleging a partnership between the parties to said combination and an accruing of profits, seeking to recover the ratable share of his defunct corporation therein. It was held that, "as it appears from plaintiff's own showing that he can have a recovery in his action only by the enforcement of an illegal contract in his behalf, a demurrer to his complaint will be sustained." Affirming 11 N. Y. S. 118; Gray v. Oxnard Brothers Co., 13 N. Y. S. 86.

In Pac. Factor Co. v. Adler (Cal. Supreme Court, July, 1891), it appeared that plaintiff had contracted with defendant for the exclusive sale of all the grain bags in defendant's possession. Upon his refusal to perform the contract and action for breach of the contract, defendant set up as a defense that plaintiff had by similar contracts obtained control of three-quarters of all the grain bags which would arrive in California prior to a given date with a view to "cornering" the market and fleeching the farmers. This plea was held good on demurrer.

In India Bagging Ass'n v. Kock, 14 La. Ann. 168, several firms owning a large quantity of Indian cotton bagging had agreed among themselves not to sell except upon consent of a majority of the participants. The court, in refusing to enjoin a

from all owners of the stock and held by a common agent or trustee; [1] in other cases trust certificates have been issued.[2] All such arrangements are restrictive of trade and illegal, and any party may withdraw at pleasure.[3]

§ 120. **Pooling arrangements.**—Courts long ago exercised jurisdiction to regulate rates of *quasi* public corporations, and on the same principle will refuse to enforce pooling contracts between railroad and gas companies. Such contracts are void as against public policy.[4]

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violation of the compact by one of the parties, said.—"Such combinations are contrary to public order, and cannot be enforced in a court of justice." To same effect is Arnot v. Pittson, etc., Coal Co., 68 N. Y. 558; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434. Compare Kellogg v. Larkin, 3 Pin. Wis. 123. But in Mallory v. Hanaur, etc., Co., 2 Pickle, Tenn. 598; 8 S. W. 346, it was held that where four cotton seed oil companies had entered into a combination illegal because in restraint of trade, and amounting to a copartnership, one of them might sue for and recover property held by the assumed copartnership. And it seems that in order to render the combination unlawful as being in restraint of trade, it must have the effect of destroying or hampering competition in some article of common necessity. In Com. v. Smith, 143 Mass. 169; 9 N. E. 629, the action was by one manufacturer of shade rollers against another to enjoin a violation of the compact. The court said:—"The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market. . . . . It does not look to affecting competition from outside—the parties have a monopoly by their patents—but only to restrict competition in price between themselves."

Moreover, it must appear that the restraint is not merely local but general. Shrainka v. Scharringhausen, 8 Mo. App. 522. See also Marsh v. Russell, 66 N. Y. 288; Diamond Match Co. v. Koeber, 106 N. Y. 473; Wicken v. Evans, 3 De G. & J. 318; Ontario Salt Co. v. Merchants' Salt Co., 18 Grant's Ch. 540; Mogul, etc., Co. v. McGregor, 59 L. T. Rep. 514. People v. Chicago Gas Tr., 130 Ill. 268; 22 N. E. 798; State v. Neb. Distilling Co., (Neb.) 46 N. W. 155; People v. Refining Co., 54 Hun, 354.

1 Woodruff v. Dubuque, etc., R. R. Co., 30 F. 91. See also Brown v. Pac. Mail Steamship Co., 5 Blatchf. 525, holding that such proxies are irrevocable but not void. Reed v. B'k of Newburgh, 6 Paige, 337.

2 See Griffith v. Jewett, 15 Weekly Law Bull. 419; Vanderbilt v. Bennett, 19 Abb. N. C. 460; 2 Ry. & Corp. L. J. 409.

3 Fisher v. Bush, 35 Hun, N. Y. 641; Havemeyer v. Havemeyer, 43 N. Y. Sup. Ct. 506; Moses v. Scott, 84 Ala. 608; 4 South. Rep. 742; Harper v. Raymond, 3 Bosw. N. Y. 29.

4 An agreement between two companies in Chicago "to keep out of each

§ **121. When quo warranto proceedings will lie.**—If a trust assume the shape of an incorporated association, a partnership or joint stock company without doing anything to render it amenable to a proceeding on the part of the state for usurpation of franchise of being a corporation the trust itself will be difficult to deal with. Where, however, the trust is formed by the integral parts without going through the formalities prescribed by the statute, or becoming incorporated as such, and the association so formed proceeds to issue shares to represent the various interests, such as regular corporations usually do, a proceeding by *quo warranto* may be effectually prosecuted against it as was done in the case of State v. American Cotton Seed Oil Trust.[1]

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other's territory" was void. Chicago, etc. Co. v. People, etc., Co., 121 Ill. 530; 13 N. E. Rep. 169; Gibbs v. Consol. Gas Co., 130 U. S. 397.

[1] 40 La. Ann. 8; 1 Ry. & Corp. L. J. 509. Houston, J. in rendering judgment against the defendant in the proceeding said: "The character of acts is determined by their nature as defined by law. If the law defines certain acts as corporation acts, persons will not be heard to say that they understand such acts not to be corporation acts, but simply acts to be legally done by commercial partners, by trustees, or by other voluntary unincorporated associations. The acts charged against the trust are set forth in the beginning of this opinion. If the trust has done all the things there charged, and it must be assumed that it has done them, in manner and form charged, has it acted within the State of Louisiana as a corporation?" . . . . . . "It is alleged herein that the trust is composed of more than six persons; that they have a president, two vice-presidents, a secretary and treasurer; that they act under the name of the American Oil Trust, a name which raises the presumption of an entity distinct from themselves; that the persons who compose the trust have associated themselves for the purpose of controlling and running the cotton-oil mills of the Southern States, or in other words, to carry on manufacturing business; that they have issued shares of stock which they have put on the market, or in other words, that they claim to have a perpetual succession. It will be seen by a reference to the characteristics of a corporation, as set forth in the articles and sections of Louisiana law herein cited in full, that the acts alleged against the Oil Trust constitute every act, except one, that may be done by a duly incorporated corporation. That one corporation act not alleged to have been done by the Oil Trust is the act of setting forth the liability of the members is restricted to the amount subscribed or paid for stock." . . . . . . "A commercial partnership has no right to issue transferrable stock and to set up a claim of perpetual succession. To do so would be to render itself liable to be preceded against as acting as a corporation without being incorporated." See also State v. North etc., Co., 54 Hun, 354; People v. Chicago Gas T. Co., 130 Ill. 268; People v. Distilling Co.

§ 122. **The law against perpetuities.**—In many states are found statutes limiting the period during which property may be held in trust and defining the purposes for which a trust may be created.[1] These statutes

(Neb.), 46 N. W. 155. These cases decided no new principle nor did it suggest any new remedy. The cause of action did not arise from nor depend upon the character of the agreement, but upon the unlawful assumption of corporate powers in the transaction of the business. The legal results to corporations themselves upon *quo warranto* proceedings, based upon an unauthorized delegation of powers and franchises, is treated in a future chapter, Infra, ch. xxxv. The anti-monopoly policy of courts in giving effect to the remedy was thus expressed by Finch, J., in People v. North Riv. Sugar Refinery Co., 121 N. Y. 582; 53 Hun, 635.

"The judgment sought against the defendant is one of corporate death, a state which created asks us to destroy, and the penalty invoked represents the extreme vigor of the law. Two questions open before us: First, Has the defendant corporation exceeded or abused its powers ? and second, Does that excess or abuse threaten or harm the public welfare ? We find in evidence that it has become an integral part and element of a combination which possesses over it absolute control, and dictates the extent and manner and terms of its entire business activity. The defendant corporation has lost the power to make a dividend. and is compelled to pay over its net earnings to a master whose servant it has become. Under an order from that master, it refused to refine sugar, and by so much has lessened the supply upon the market. It cannot stir unless its master approves, and yet it is entitled to receive from the earnings of other refineries amassed as profits in the treasury of the board its proportionate share for division among its own stockholders, who now own substitute certificates. In return for this advantage, it has become liable to become mortgaged, not for its own corporate benefit alone, but to supply with funds a controlling board when that board reaches out for other coveted refineries. All this is admitted by defendant. . . . . . The defendant could have prevented it being founded, by refusing to register or recognize the legal transfer of stock. They should have appealed to the law, thus shattering the trust at the outset. The question to be determined is, whether the conduct of the defendant in aiding to form the trust was illegal. In all these points which have been reviewed, it is found the corporation was doing the public an injury, and, in avoiding the state law which compels the reservation of corporate rights, proved unfaithful to its charter. The present corporation of trust puts upon the market a capital stock, proudly defiant of the actual values and capable of unlimited expansion. It is one thing for a state to respect the rights of ownership, and quite another thing to add to the possibility of the further extension of their consequence, by creating artificial authorities in the management of such aggregations. If corporations could combine and mass their forces in a solid trust, with little added risk to capital already in, without limit to magnitude, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and strength any possibilities of individual ownership. The state seeks to protect individuals rather than combinations."

[1] In New York, California and several other states, trusts in real estate are valid only when created for the following purposes:—1. To sell the land for

may offer serious objections to the permanency of "trusts."

Their provisions vary so considerably that it would be impossible to give them special attention. The usual limitation as to time is the lifetime of the survivor of persons then living and designated by the person creating the trust. An exception is sometimes made for the benefit of infants and posthumous children, and the period is extended for twenty-one years and some months beyond the lives of persons in being at the time of making the conveyance in trust. These provisions usually apply alike to both personalty and real estate.[1]

§ 123. The placing of property in trust usually lawful.—There is no legal objection to the placing of merchandise and shares of stock in trust. But whether goods, wares and merchandise and other personal property, constituting one's stock in trade, can be placed in the hands of a trustee for the purpose of carrying on business for the benefit of the *cestui que trust* is a different question. Such an arrangement seems to be legal and allowable in England,[2] and would probably be held so in this country in the absence of a prohibitory statute, or one prescribing the purposes for which trusts in personal property may be created and failing to mention that as one of them.

In New York where the statutes do not define the objects for which express trusts of personal property may be created, such trusts may be created for any purpose which is not otherwise illegal.[3]

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the satisfaction of creditors or a charge thereon; 2. To sell, mortgage or lease it for the benefit of legatees; 3. To receive the rent and use it for the support of a certain person; or, 4. To accumulate the rent for a certain person. 2 R. S. of N. Y. 728, sec. 55, p. 2181, 7th Ed.; Civil Code of Cal., sec. 857.

[1] For definite information see Stinson's American Statute L., sec. 1703.

[2] Ex parte Garland, 10 Ves. 110; Scott v. Izou, 34 Beav. 434.

[3] Gott v. Cook, 7 Paige, 521; Graff v. Bonnett, 31 N. Y. 139; Power v. Cassidy, 79 N. Y. 602; Holmes v. Mead, 52 N. Y. 332; Bucklin v. Bucklin, 1 Keyes, 141. The statutes of Cal. are similar in this respect to those of New York.

§ 124. **Mutation of beneficiaries allowable.**—It is no legal objection to a trust that the beneficiaries change and fluctuate as would necessarily happen where their interests are represented by certificates of shares in the common concern assignable like other stock. The law allows change and substitution of beneficiaries.[1]

§ 125. **What constitutes restraint of trade.**—It certainly is not true that every contract which reduces competition or that restrains trade is illegal; nor does the form of a contract, whether it be articles of association in a corporate capacity or of copartnership, or the relation assumed in it, whether it be that of shareholder, partner or associate *cestui que trust*, determine its legality. The natural result of the sale of a railroad to a rival line destroys competition and generally restrains, that is, lessens traffic by increasing rates. And the same could be said in every case where a merchant buys out his rivals and secures a monopoly in a town. There is substantial harmony between the English and American definitions of monopoly, the two countries agreeing that contracts entered into by and between two or more corporations, the necessary result of whose performance will crush and destroy competition, are illegal.

§ 126. **General view.**—It is plain that under our constitutional system there are no certain and adequate legal means by which abuse of the privileges of united capital by persons and corporations for commercial and industrial purposes can be reached and remedied. True, much less serious and threatening tendencies have been corrected by amendments to the constitution, yet one of the fundamental ideas of a government based

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[1] Perry on Trusts; Harrison v. Harrison, 36 N. Y. 543; Conkling v. Washington University, 2 Md. Ch. 497.

upon equality of rights before the law and great individual liberty is non-interference with purely economical matters. Sumptuary legislation is not favored by our people unless it be confined to such species of business as are in themselves demoralizing and vicious.

The peculiar results which have followed the unrestricted wielding of power inherent in the possession of a large accumulation of wealth was not foreseen by the founders of this or other modern nations, and it is not probable that any checks upon the exercise of the power could have been provided even if such checks had been deemed advisable.

Great inequalities in both condition and productive capacity between the wealthy few and the less fortunate multitude is inseparable from an age of universal peace and industrial activity ; and it must be admitted that while a republican form of government secures immunity from domination of one man or a few over the persons, lives and liberties of individuals, it gives but little if any more protection from a power which controls the rewards of industry than more despotic governments.[1]

§ **127. Conclusion.**—Whenever the people feel inclined to take a step in a direction opposite to that taken by those who first planned our form of government on the basis of large personal liberty, only limited where lim-

1 "Fortunately," said Justice Barrett, delivering the opinion in the case of the North Riv. Sugar Refining Co. case (5 R. & Corp. L. J. 56), "the law is able to protect itself against abuses of the privileges which it grants." Fortunately for the state of New York, on the facts of that case and the laws as there adjudicated, the law was "able to protect itself." But as has been seen, no two trusts are organized so as to affect the public alike, or to the same extent; nor are the laws of different jurisdictions the same or construed alike. And a trust held to be legal in one state may have its agents in New York; and since the validity of a charter depends upon the law of the state of its creation, the acts of such agent, valid in themselves, could not be prevented or interfered with by the New York courts unless they were *ultra vires* when compared with the charter.

itations were required for the common good, they can easily amend the national and the respective state constitutions so as to confer upon congress or state legislatures, or both, additional powers, or an enlargement of discretion in the exercise of those already possessed.

Most of the amendments to the federal constitution so far adopted have had the effect to still further limit legislative power. To remove some of these limitations in order to give arbitrary powers over corporations and corporate charters would certainly be a radical innovation in the plan upon which has been erected the entire superstructure. Whether the danger of such a precedent is more to be feared than aggressions of monopoly is a question which the people themselves must solve.

An amendment taking away from the states the power to create corporations and conferring upon Congress exclusive and unlimited power to grant charters and to repeal, alter, and amend them at any and all times, might meet all the necessities of the case, and enable the people through their representatives to remove any existing or threatening evil in the shape of corporate combinations.

It is important in this connection to bear in mind that the prohibition against the impairment of the obligations of existing contracts does not apply to congress except in cases where the judiciary have given such an extension to its spirit. If it can, in any sense, be claimed that such a rule has been established, it is certainly true that it was deliberately departed from in the Sinking Fund Cases in results, if not *pro forma*; and there was a still more striking departure in the case involving the Mormon Church charter and property.[1]

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[1] Sinking Fund Cases, 99 U. S. 700; Late Corp. Church, etc., v. U. S., 136 U. S. 1.

CHAPTER VIII.

POWER TO CONTRACT.

§ 128. The power subject to ordinary rules of construction.—Contracts by corporations are made in like manner, are of equal binding force and are affected by the same principles, as those made by individuals.[1] And the range of contracts which they may make is co-extensive with the powers expressly and impliedly conferred by the charter or general law.[2] This being the

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[1] Cicotte v. Church, 60 Mich. 252; supra, §§ 3, 61.

[2] Baptist Church v. Mulford, 8 N. J. L. 182; Re Whitehall, 3 Searg. & R. 117; Dunn v. St. Andrews Church, 14 Johns. 118; B'k of Columbia v. Patterson, 7 Cranch. 299; Warring v. Cahawba Co., 2 Bay (S. C.) 109; Hayden v. Middlesex Tp., 10 Mass. 397; Poultney v. Wells, 1 Ark. 180; Proctor v. Webber, 1 D. Chip. (Vt.) 371, 456 note; Chesapeake, etc., Canal Co. v. Knight, 9 Pet. 541; Banks v. Poitiaux, 3 Rand. (Va.) 136; Gooday v. Colchester Ry. Co., 17 Beav. 132; Crawford v. Langstreet, 43 N. J. L. 325; St. James, etc., v. Newburyport, etc., R. R., 141 Mass. 500; 6 N. E. 749; Levering v. Mayor, etc., 7 Humph. 553; Despatch, etc., v. Bellamy, etc., Co., 12 N. H. 205; B'k etc., v. Guttschlick, 14 Pet. 19; Eureka Co. v. Bailey Co., 11 Wall. 488; Hunt v. S. Francisco, 11 Cal. 250; Cape Sable Co's. Case 3 Bland (Md.) 606; McCracken v. Halsey Fire Engine Co., 57 Mich. 361; City of Davenport v. Peoria, etc., Co., 17 Ia. 276; B'k of U. S. v. Dandridge, 12 Wheat. 64; Gottfried v. Miller, 104 U. S. 521; Hoag v. Lamont, 60 N. Y. 96; McCulloch v. Talladega Ins. Co., 46 Ala. 376; Ruesbach v. La Souer Mill Co., 28 Minn. 291; Racine & M. R. Co. v. Farmer's Loan & Trust Co., 49 Ill. 331; Bulkley v. Briggs, 30 Mo. 452; New England F. & M. Ins. Co. v. Robinson, 25 Ind. 536; Hamilton v. Lycoming Ins. Co., 5 Pa. St. 339; Muir v. Louisville & P. Canal Co., 8 Dana (Ky.), 161; Henning v. U. S. Ins. Co., 47 Mo. 425; Amherst Academy v. Cowls, 6 Pick. 427; Kennedy v. Baltimore Ins. Co., 3 Har. & J. 367. A corporation cannot bind itself as surety, Filow v. Brewery Co., 15 N. Y. S. 57 (Aug. 1891). It is a question of fact for a jury and not one of law, whether the use of a barge falls within the scope of the business of a corporation chartered to operate steamboats on a navigable river and to carry freight and passengers, 4 Tenn. Riv. Tr. Co. v. Kavanaugh (Ala.), 9 So. 395 (Aug. 1891). A building association organized and incorporated under Rev. St. Wis. c. 93, not being prohibited either by statute or by-law from borrowing money, may, on maturity of a series of stock, borrow money to pay the shares of the non-borrowing members of such series, instead of accumulating funds to pay off such series, and having the power

case, it is of more importance, as well as more appropriate, here to consider the restrictions upon the right than its extent.

§ **129. Disabling contracts void.**—Contracts amounting to a disqualification on the part of a corporation to perform any duty which it owes to the state, or which have the effect of disabling it from so doing; and contracts which are immoral or are otherwise contrary to the interests of society, are void and will not be enforced, no matter to what extent performance has proceeded.

First in importance under this head, are contracts whereby corporations undertake to dispose of, or deprive themselves of the power to exercise the franchises vested in them by the state under their charters.[1]

§ **130. The public character of franchises.**—The reasons of this rule are founded upon the very definition of a franchise as given by Finch: "a royal privilege or a branch of the king's prerogative subsisting in the hands of the subject."[2] The right to act in a corporate capacity is itself a franchise belonging to its members and it may possess other franchises such as the right to take tolls, to operate a railroad and the like. Indeed,

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to borrow, has, in the absence of express prohibition, the implied power to assign its mortgages and bonds as security for the loan. North Hudson Mut. Bldg. & Loan Ass'n v. First Nat. Bank (Wis.), 47 N. W. 300.

An agreement by a bank to procure a release of a mortgage held by a third person upon lands on which the bank also had a mortgage, although not primarily an agreement relating to banking, yet, when made to secure payment of the debt due the bank, is not *ultra vires*. McCraith v. National Mohawk Valley Bank, 104 N. Y. 414; 10 N. E. 862.

[1] Principle of text applied to unauthorized lease of a railroad where road had been used by lessee for three years and rental paid. He was held not estopped to set up the invalidity of the contract. Or. Ry. & Nav. Co. v. Or. Ry. Co., 130 U. S. 1; P. C. & St. L. Ry. Co. v. K. & H. Br. Co., 131 U. S. 371; Humphreys v. St. L. I. M. & S. Ry. Co., 37 F. 307.

[2] Bank of Augusta v. Earle, 13 Pet. 519.

a corporation is made up of rights and privileges owned and possessed by the legal entity. The advance of commerce, the spread of arts, and the multiplication of the conveniences and comforts of life, resulting from corporate enterprises, have given to the exercise of franchises a high character of public utility. Instead of being regarded as mere donations of the sovereign, revocable at will, as formerly, the right to exercise them has become a contract between the government and the private citizen based upon valuable consideration for purposes of public benefit, as well as of private advantage.

§ 131. Applies to corporations formed to supply commodities to the public.—Where the legislature has granted to a corporation an exclusive right to supply gas or water to a municipal corporation, the right so granted is a franchise, and the grant a contract protected by the constitution of the United States.[1] The contractual relation with the state being admitted it is self-evident that the responsibility of a due performance of the undertaking on the part of the corporation cannot be shifted or delegated without the state's consent.[2] A corporation having undertaken the performance of certain duties specified in its charter, presumed to be of public benefit, cannot transfer either such duty or its own existence into another body. Neither can it enable another to act in its name except as its agent.[3]

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[1] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. v. Citizens' Gas Co., Id. 683; New Orleans Water Works v. Rivers, Id. 674. When, however, such right is conferred by municipal authorities it is a mere license. People v. Mut. Gas Light Co., 38 Mich. 154.

[2] Welsh v. O. D. Min. & Ry. Co., 56 Hun, 650; 10 N. Y. S. 174; People v. Stanford, 77 Cal. 360, 18 P. 85. But under the Indiana statute the charter of a gravel road company may be purchased and assigned so as to vest title in the purchaser. State v. Hare, 121 Ind. 308.

[3] The general doctrine is sustained by the following additional authorities: Balsley v. St. L. A. & T. H. R. Co., 119 Ill. 69; 8 N. E. 859; Singleton v.

Unless, therefore, some positive statutory provision has authorized it and pointed out the manner in which it may be effected, any sale or transfer of its franchise by a corporation is *ultra vires* and void.[1] In addition to the reason that such sale would be the violation of a compact, it is against public policy, the presumption being that those in whom the franchise was at first vested possess some peculiar qualifications for the exercise of the same for the public benefit.

§ 132. Application of the principle to railroad companies. —Railroad companies have granted to them, by their charters, franchises intended, in a large measure, to be exercised for the public good. The due performance of these, being the consideration for the public grant, any contract which disables corporations of that character from performing their functions—which purports to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes without the consent of

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Southwestern R. Co., 70 Ga. 464; So. Pac. Ry. Co. v. Esquibel (N. M.), P. 109; Washington A. & G. R. v. Brown, 17 Wall, 445; Macon & N. R. v. Mayes, 49 Ga. 355; Lakin v. Williamette Val., etc., R. Co., 13 Or. 436; 11 P. 68; Ohio, & M. R. Co. v. Dunbar, 20 Ill. 623; State v. Minn. Cent. R. Co., 36 Minn. 246; 30 N. W. 816; Nelson v. Vt. & C. R. Co., 26 Vt. 717. In the last case cited Judge Redfield said:—"The lessors must at all events be held responsible for just what they expected the lessees to do, and possibly for all which they do do as their general agents, for the public can only look to that corporation to whom they have delegated this position of public service."

[1] G. C. & S. F. Ry. Co. v. Morris, 67 Tex. 692; 4 S. W. 156; Fietsam v. Hay, 122 Ill. 293; 13 N. E. 501; People v. N. R. S. R. Co., 121 N. Y. 582; 5 R. & Corp. L. J. 52; Branch v. Jessup, 106 U. S. 468; Hall v. Sullivan R. R. Co., 22 L. R. 138; Ricketts v. C. & O. Ry. Co., 33 W. Va. 433; 10 S. E. 801; So. Pac. Ry. Co. v. Esquibel (N. M.), 20 P. 109; Shaw v. Norfolk County, 5 Gray, 162; Pollard v. Maddox, 28 Ala. 321. The fact that a railroad does not run in the same general direction does not necessarily prevent it from being a competing line within the meaning of a statute prohibiting leases and sales to any "parallel or competing railroad." East Line & R. R. Co. v. State, 75 Tex. 434; 12 S. W. 690.

the state—is a violation of the contract with the State, and is void.[1]

§ **133. Statutory authority to lease.**—Many states have, by general law, conferred upon railroad companies, authority to lease their lines to other companies subject to certain restrictions and limitations. Upon the construction of such authority there is not entire uniformity of decisions, owing partly to the differing phraseology in the acts by which the power is given.[2] A lease made by one railroad corporation to another, when not expressly authorized by law, is within the

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[1] York, etc., R. R. Co. v. Winans, 17 How. (U. S.) 30; Thomas v. R. R. Co., 101 U. S. 71: Troy & Rutland R. R. Co., v. Kerr, 17 Barb. (N. Y.) 581, 601; Centr. Transp. Co. v. Pullman Pal. Car Co., 11 S. Ct. 478; Lakin v. Williamette, etc., R. C. Co., 13 Or. 426; 11 P. 68; Beman v. Rufford, 1 Sim. N. S. 550; Gt. Northern R. R. Co. v. Eastern Counties R. R. Co., 9 Hare 306; East Line & R. R. R. Co. v. State, 75 Tex. 434; Ricketts v. C. & O. R. Co., 33 W. Va. 433; South Yorkshire R. R. Co. v. Gt. Northern R. R. Co., 3 De G. M. & G. 376; 9 Exch. 19; 84 Eng. L. & Eq., 513; Black v. Del. & Raritan Can. Co., 22 N. J. Eq. 130; S. C. 24 N. J. 455; Hays v. Ottawa, etc., R. R. Co., 61 Ill. 422. See also Shrewsbury, etc., R. R. Co. v. Northwestern R. R. Co., 6 House of Lords, 113; East Anglican R. R. Co. v. Eastern Counties R. R. Co., 73 Eng. Com. L. 775; 11 C. B. 75; Winch v. Birkenhead, R. R. Co., 16 Jur. 1035; Richardson v. Sibley, 11 Allen, 65; Stewart's App., 56 Pa. St. 413; State v. Consol. Co., 46 Md. 1; Ohio & Miss. R. R. Co. v. Ind. & Cin. R. R. Co., 14 Am. L. Reg. 733; Lauman v. Lebanon Val. R. R. Co., 30 Pa. St. 42; Coe v. Columbus, etc., R. R. Co., 10 Ohio St. 372; Pullman v. Cin. & Chicago R. R. Co., 4 Biss. 35; Philadelphia v. Western Un. Tel Co., 11 Phil. 327; Treadwell v. Salisbury, 7 Gray, 393.

[2] Under such statute a contract by which the lessee guarantees the payment of the interest on bonds, the interest being the same amount and payable at the same time as the agreement, is valid. Eastern T. B'k v. St. J. & L. C. R. Co., 40 F. 423; Brown v. Toledo, P. & W. R. Co., 35 F. 444; or to agree to pay in addition to such interest the principal of liabilities at maturity, Gere v. N. Y. Cent. & H. R. R. Co., 19 Abb. N. C. N. Y. 193. For the construction of such statutes see Harkness v. Manhattan Ry. Co., 54 N. Y. Sup Ct. 174; Chicago M. & St. P. Ry. Co. v. Third Nat. B'k, 134 U. S. 276; Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S., 356; P. C. & St. L. Ry. Co. v. K. & H. Br. Co., 131 U. S. 371; Briscoe v. So. Kan. Ry. Co., 40 F. 273: Int. & G. N. R. Co. v. Eckford, 71 Tex. 274; 8 S.W. 579; State v. R. Co., 24 Neb. 143; Livingstone County v. Bank, 128 U. S. 102; Miller v. N. Y. L. & W. R. Co., 20 N. Y. St. R. 157; 3 N. Y. S. 245.

general rule, and void.[1] Leases of their lines by street railways in consideration of a fixed dividend to be paid to the stockholders, are likewise invalid, when not expressly authorized.[2]

§ 134. **Public charge attaches in hands of lessee.**—The lessee of franchises charged with a public tax or burden by the terms of the charter of the lessor corporation takes the privilege subject to the charge. Thus where the amended charter of a street railroad company required that one per cent of its gross earnings should be paid to the city in lieu of a license fee, it was held that a lessee of the road was bound to discharge the obligation by paying the percentage though the lease was silent regarding it, and though there was no statutory provision for such liability.[3]

§ 135. **Lessor company remains liable.**—But the lessor company remains liable for the performance of public duties, to private parties for the non-delivery of goods received by it for delivery and for all acts done by the

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[1] Pittsburgh C. & St. L. R. Co. v. K. & H. Bridge Co., 131 U. S. 371; Or. Nav. Co. v. Or. R. Co., 130 U. S. 1; East Line & R. R. Co. v. State, 75 Tex. 434; Thomas v. R. R. Co., 101 U. S. 71; Penn. R. R. Co. v. St L., etc., R. R. Co., 118 U. S. 290, 630; Ry. Co. v. Morris, 37 Tex. 692; 3 S. W. 457; Int. & G. N. R. Co. v. Eckford, 71 Tex. 274; State v. Atchinson & N. R. Co. (Neb.), 38 N. W. 43; Camden & A. R. Co. v. Mays Ldg. & E. H. C. R. Co., 48 N. J. L. 530; 7 A. 523.

[2] Middlesex R. R. Co. v. Boston, etc., R. R. Co., 115 Mass. 347; Pittsburgh, etc., R. R. Co. v. Bedford, etc., R. R. Co., 81 Pa. St, 106.

[3] In Mayor, etc., *v.* Twenty-third St. Ry. Co., 113 N. Y. 311; 5 Ry. & Corp. L. J. 583, Earl, J., said:—"When the defendant took the property rights and privileges and franchises of the Bleecker St. & Fulton Ferry R. R. Co. it took them burdened with its charter obligations. Taking the place of that company as to its charter powers and rights it necessarily took its place as to its charter obligations and duties. It could not have and exercise the former without discharging the latter. A *quasi* public corporation without any charter duties is inconceivable, and so it is inconceivable that any one could acquire by acts *in pais* the charter rights without at the same time assuming the charter duties." See also State v. Northern Pac. R. Co., 36 Minn. 207; 30 N. W. 663; Char. Ty. Hos. v. N. O. Gas L. Co. (La.), 4 So. 415.

lessee in the operation of the road, notwithstanding that the lease is authorized by the lessor's charter.[1] And this is so although the lessee assumes all liability and agrees to defend suits brought against the original company and pay all judgments entered against it.[2] The reasons assigned for this rule are various. Sometimes it is said that authority to lease has merely the effect of a license revocable at pleasure, and that consequently, the lessee stands as a mere representative or agent of the lessor company; in other cases, that if a different rule were recognized the power to lease might be abused and the safety of the public endangered by merely colorable leases to irresponsible parties made for the very purpose of shifting and escaping liability.[3]

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[1] Nat. B'k v. Atlanta & C. A. R. Co., 25 S. C. 216; Gt. Western R. Co. v. Blake, 7 Hurlst & N. 987; Birkett v. Whitehaven Junct. R. Co., 4 Hurlst. & D. 730; Buxton v. N. E. Rl. Co., L. R., 3 Q. B. 549; Miller v. N. Y. L. & W. Ry. Co., 20 N. Y. St. R. 157; 3 N. Y. S. 245; Thomas v. Rhyraney R. Co. L. R., 6 Q. B. 266; Settler v. Chicago & N. W. R. Co., 49 Wis. 609; Wabash St. L. & P. R. Co. v. Peyton 106 Ill. 534; Bissell v. Mich. Sou. & N. J. R. Co., 22 N. Y. 258; Peters v. Rylands 26 Pa. St 497; lessee Co. bound to construct crossings at farms, Buf. S. & C. Co. v. Del. L. & W. R. Co., 7 N. Y. S. 604; liable for death of employee on leased line Pa. R. Co. v. Sellers, 127 Pa. St. 406. But a lessor of a railroad is not liable for damages to land adjacent to the railroad land, caused by the washing thereon of earth and sand from an embankment erected by the lessee in filling in a trestle, where the lessor was not bound to build such embankment, and there is no evidence that the trestle was not sufficient at the time of the lease, or that it was then a nuisance, though the lessor was bound by the lease to pay the lessee for any work chargeable to construction. Reversing 3 N. Y. S. 245.—Miller v. New York, L. & W. R. Co. (N. Y.), 26 N. E. 35.

[2] Braslin v. Somerville H. R. Co., 145 Mass. 64; 13 N. E. 65.

[3] See in addition to cases cited in note one; Harmon v. Columbia & G. R. Co., 28 S. C. 401; 5 S. E., 835; Int. & G. N. R. Co. v. Moody, 71 Tex. 614; 9 S. W. 465; Stodder v. R. R. Co., 50 Hun 221; Nugent v. B. C. & M. R. Corp., 80 Me. 62; 12 A. 797; Naglee v. Alexandria & E. Ry. Co., 83 Va. 707; 3 S. E. 369; Mo. Pac. Ry. Co. v. Dunham (Tex.), 4 S. W. 472; Penn. R. Co. v. Ellett (Ill.), 24 N. E. 559, holding both lessor and lessee liable; Lakin v. Williamette, etc., R. Co., 13 Or. 436, where lease was unauthorized; Brown v. H. & St. J. R. Co., 27 Mo. App. 394, holding it unnecessary for plaintiff to make any allegation in regard to the lease. In East Line & R. R. R. Co. v. Culberson, 72 Tex. 375; 10 S. W. 706, it was held that where an employee of a company in possession of and operating the road of another as lessee without statutory authority was in-

§ 136. General power to mortgage corporate property.—The common law rights of corporations to contract debts, implies the right to issue evidences of indebtedness and to secure the same by mortgage upon the corporate property.[1] And a fair construction of an act authorizing corporations formed thereunder to borrow money for the purpose of constructing their works, and to issue bonds in payment, permits a corporation to purchase works already constructed to its hand.[2]

This right to mortgage is subject only to the condition that the contract, the performance of which is secured by the mortgage, is one which, from the nature and objects of incorporation, the corporate body is expressly or impliedly authorized and empowered to make. If the indebtedness contracted and the mortgage given to secure the same, be in excess of the powers of the corporation, that is, not necessary to the accomplishment of the objects for which it was formed, it is *ultra vires*.[3]

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jured he could not recover damages for his injuries from the lessor company. Compare Int. & G. N. R. Co. v. Underwood, 67 Tex, 589; 4 S. W. 216; Lakin v. Williamette, etc., R. Co., 13 Or. 436; The fact that the liability arises from injuries to employees of the lessee company is held to make no difference with respect to the lessor's liability. Nugent v. Boston, C. & M. R. Corp., 80 Me. 62; 12 A. 797; Augusta & K. R. Co. v. Kilian, 79 Ga. 234; 4 S. E. 165; Contra, Va. M. R. Co. v. Washington, 86 Va. 629; 10 S. E. 927.

[1] Bank of Australasia v. Brellat, 6 Mod. P. C. 152; Royal British B'k v. Turquand, 6 E. & B. 327; In re Internat. L. Ass'n Soc. L. R. 10 Eq. 312; In re General South Am. Co. L. R., 2 Ch. D. 337, 340; Detroit v. Mut. Gas Light Co., 43 Mich. 594; Burt v. Rattle, 31 Ohio St. 116; Wood v. Whelen, 93 Ill. 153; Lehman v. Tallahassee Mfg. Co., 64 Ala. 567; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Larwell v. Hanover, etc., Soc., 40 O. St. 274; Excelsior, etc.. Co. v. Pierce (Cal.), 27 P. 44 (Sept. 1891). A bill to foreclose a mortgage executed to a life insurance company to secure payment of a bond is not subject to demurrer for failing to show affirmatively the capacity of the company to loan money and take mortgages. Boulware v. Davis (Ala.), 8 So. 84.

[2] Gamble v. Queens County Water Co., 123 N. Y. 91; 25 N. E. 201.

[3] Gardner v. London, etc., Ry. Co., 2 Ch. App. 201; Authority given to mortgage for one purpose will not authorize a mortgage for another purpose wholly disconnected with the object named. Frazier v. E. T. Va. & Ga. R. Co., 88 Tenn. 138; 12 S. W. 537. Infra, § 765 et seq.

But even in that case, the corporation would generally be estopped from setting up the invalidity of the mortgage, to defeat the rights under it of *bona fide* holders.[1]

§ 137. Of corporations charged with public duties.—Such is the well established rule with respect to all ordinary private corporations organized and conducted for profit. In the case of those corporations whose business largely concerns public interests, a somewhat different rule prevails. It only extends however, to those properties, the alienation of which would disable them from performing duties which they owe to the public.[2]

They have the same right to dispose of and encumber their property not essential to the exercise of public functions as other private corporations. For instance, lands of a railroad company not acquired in the exercise of the right of eminent domain or so connected with the franchise to operate and manage a railroad that the alienation would tend to disable the corporation from performing the public duties imposed upon it, and in consideration of which its chartered privileges have been conferred, may be conveyed or

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[1] Tex. W. R. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98; Beekman v. H. R. W. S. R. Co., 35 F. 3; Fisk v. Patton (Utah), 27 P. 1 (Aug. 1891); infra, § 767.

[2] South Yorkshire Ry. & R. D. Co. v. Gt. N. Ry. Co., 9 Ex. 55, 84; Shrewsbury & B. Ry. Co. v. North-Western Ry. Co., 6 H. L. 113, 135; Gt. N. Ry. Co. v. Eastern Counties Ry. Co., 21 L. J. Ch. 837; Winch v. Birkenhead L. & C. Junc. Ry. Co., 5 De. G. & S. 562; 9 Hare, 306; 7 Railw. & C. Cas. 643; East Anglican Ry. Co. v. Eastern Counties Ry. Co., 11 C. B. 775; Riche v. Ashbury Ry. C. & I. Co. L. R. 9 Ex. 224, 264; Bagshaw v. Eastern Un. Ry. Co., 7 Hare, 114; 2 Mac. & G. 389; Whiteside v. Bellchamber, 22 Upp. Can. (C. P.) 241. A town which has voted aid bonds to a railroad company cannot by means of a lease of the road to another company be deprived of the benefits of the location of the road. State v. Centr. Iowa R. Co., 71 Ia. 410; 32 N. W. 409. But lessees of purchasers of consolidated railroads are not bound by stipulations in a contract between a county and the companies binding them to stop all trains at the depot at the county seat, the consideration and a condition of the contract being a gift by the county to the companies of large sums of money. People v. L. & N. R. Co., 120 Ill. 48; 10 N. E. 657.

mortgaged with like effect, as if owned and conveyed by any other private corporation under the general common law right independently of special statutory authority.[1]

§ 138. **Mortgages ultra vires in part only.**—If a corporation include in the same mortgage property which it may legally mortgage and other property which it can not, in accordance with a familiar principle the mortgage will be held valid with respect to the first and voidable as to the second, provided the good and bad parts be capable of separation.

And a mortgage given of property which the corporation had no right to convey without legislative permission may be afterwards validated by the legislature.[2]

The adjudications on the subject furnish a legitimate and fair application and illustration of the common law rule that the mortgagor is not bound to the mortgagee for rents and profits while he remains in possession.[3]

§ 139. **Rolling stock as a subject of mortgage.**—There has long been a conflict of authorities on the character of rolling stock as property—whether it passes under a mortgage as real estate or as personalty—and the question is not yet fully settled. The weight of authority however is to the effect that it is neither real estate proper nor fixtures. Two reasons are stated for

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[1] Jones on Corp. Bonds and Mort. Sec. 12; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Farnsworth v. Minn. & P. R. R. Co., 92 U. S. 49; Tucker v. Ferguson, 22 Wall. 527, 572.

[2] Richards v. Merrimac, etc., R. R. Co., 44 N. H. 127; White Water Valley Canal Co. v. Valette, 21 How. 414; Portland, etc., R. R. Co. v. Kennebec, etc., R. R. Co., 59 Me. 9; Shaw v Norfolk, R. R. Co., 5 Gray, 162.

[3] Jones on Mort. Sec. 670; Moore v. Titman, 44 Ill. 367, 371; Lehman v. Tallahassee Mfg. Co., 64 Ala. 567.

this view: one founded upon the movable nature of the property and the other upon convenience. It will be observed furthermore, that some of the decisions are based upon statutory provisions.[1]

§ 140. Of rolling stock not yet in possession. The doctrine of courts of equity that a mortgage of personal property afterwards to be acquired by the mortgagor, attaches to the property as soon as it is acquired by him, is founded upon the maxim that equity considers that to be done which ought to have been done. The intention of the parties has in many of the cases been considered of controlling importance, in imparting a character to rolling stock, for the purpose of the particular mortgages involved.[2]

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[1] See Boston, etc., R. R. Co. v. Gilmore, 37 N. H. 410; Hoyle v. Plattsburgh, etc., R. R. Co., 54 N. Y. 314; Williamson v. N. J. South R. R. Co., 29 N. J. Eq. 311; reversing S. C. 28 Id. 277; Coe v. Columbus, etc., R. R. Co., 10 O. St. 372; Hill v. Lacrosse, etc., R. R. Co., 16 Wis. 214; Hardin v. Ia. Constr. Co., 78 Ia. 726; 43 N. W. 543; Pac. R. R. Co. v. Cass Co., 53 Mo. 17; Miller v. Rutland, etc., R. R. Co., 36 Vt. 452; Covey v. Pittsburgh, etc., R. R. Co., 3 Phil. 173; Pullan v. Cin., etc., R. R. Co., 4 Biss., 34. A construction company is estopped to deny ownership of rolling stock where it was mortgaged prior to being acquired. Hardin v. Constr. Co. supra.

[2] In the following cases rolling stock has been regarded as fixtures and part of the realty. Hoyle v. Plattsburgh, R. R. Co., 54 N. Y. 314; Neilson v. Ia. Eastern R. R. Co., 51 Iowa, 184; R. R. Co. v. Jarnes, 6 Wall. 750; Coe v. Columbus P. & I. R. R. Co., 10 O. St. 372; Chicago & N. W. Ry. Co. v. Ft. Howard, 21 Wis. 44; Pennock v. Coe, 23 How. 117; Farmer's L. & T. Co. v. St. Joseph & D. C. Ry. Co., 3 Dill. 412; Elizabethtown & P. R. R. Co. v. Elizabethtown, 12 Bush, 233; Youngman v. Elmira & W R. R. Co., 65 Pa. St., 278; Buck v. Memphis & L. R. R. Co., 4 Cent. L. J. 430. It has been held to be personalty in Boston C. & M. R. R. Co. v. Gilmore, 37 N. H. 410; Williamson v. N. J. South. R. R. Co., 29 N. J. Eq. 311.

"In conclusion upon this part of the subject, it may be said that, while there are many and strong arguments for holding that rolling stock is part of the realty—and this view seems to have the support of the United States courts—the weight of authority in the state courts seems to be against that position. There is, however, no hope that any uniform and settled rule upon this subject will soon be arrived at by the courts without the aid of legislative enactments. It is of the highest importance that the validity of mortgages intended to embrace the rolling stock and other personal property of a railroad should not be left to the uncertain decision of the courts; for in the present state of the law, it must

There is no doubt that as between the parties themselves their intentions when clearly to be gathered from the instrument and extrinsic circumstances, furnish a just and legal criterion of their respective rights. The question whether the mortgage covers after-acquired property often intervenes to greatly complicate the question and devolves upon the court a difficult task of construction in determining respective rights between subsequent purchasers as well as between the mortgagor and mortgagee.[1]

§ 141. Important as affecting registration.—But this question is entirely distinct and separate from that whether the property so acquired is a fixture and therefore only capable of conveyance and registration by way of mortgage or otherwise as realty or personalty which can only be legally incumbered as against subsequent purchasers for value by compliance with the statutes governing the executing and recording of chattel mortgages. In regard to this controverted question, there are strong arguments on both sides, and each state has settled the question for itself, either by statute or judicial decisions, and there seems but little prospect of a general agreement.

§ 142. Mortgage lien on after-acquired property, further considered.—The common law principle that "what

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at least, be regarded as uncertain how the question would be determined by any court not bound by a precedent or by statute." Jones on Corp. Mort. & Bonds, Sec. 150.

1 Where a mortgage had been given on the rolling stock of a certain division containing a covenant to designate in a certain mode as belonging to that division such a proportion of the whole rolling stock owned by the mortgagee as that division bore to the entire railway, it was held that as against subsequent mortgagees of the entire system of railway the first mortgage covered only such rolling stock as was thereafter designated as belonging to the division named though the amount covenanted for was not so designated. U. S. Tr. Co. v. W. W. R. Co., 38 F. 891.

a man has not that he cannot grant" is subject to several important qualifications. It does not apply to accessions and increase of property; nor to fixtures afterwards annexed to the realty by the mortgagor; nor to property agreed upon when a mortgage is given to be thereafter acquired by the mortgagor and described in the mortgage. The description, however, may be in general terms which are rendered definite by a subsequent acquisition of property falling within the general description. But aside from any doubts which have existed or may still exist as to the validity of a mortgage of future acquisitions duly recorded as affecting subsequent purchasers and incumbrancers, there is but little if any dissent from the doctrine, that as between the immediate parties the lien of the mortgage takes effect the same as upon property in possession at the time of making the mortgage.[1]

§ 143. Such provision given in effect in equity.—In equity, the principle has often been extended to mere executory agreements to mortgage after-acquired property; and courts of equity have held that a covenant to convey specific real estate was sufficient to create an equitable lien upon it in favor of the covenantee.

And that when a mortgage contains express terms by which the property to be subsequently acquired is subjected to a charge in favor of the mortgagee for present advances, or even for future advances to be made, the lien intended and provided for attaches in equity to

[1] Per Sherwood J. Phil. W. & B. R. R. Co. v. Woelpper, 64 Pa. St. 366; Chamberlin v. Conn. Cent. R. Co., 54 Conn. 472; 9 A. 244; Little Rock & Ft. S. Ry. Co. v. Page, 35 Ark. 304; Tex. W. Ry. Co. v. Gentry, 69 Tex. 625; 8 S. W. 98; Centr. Tr. Co. v. S. Centr. R. Co., 36 F. 520; Parker v. N. O. B. R., etc., V. R. Co., 36 F. 693; Poland v. Lamoille Val. R. R. Co. 52 Vt. 144; Hodder v. Ky. G. E. Ry. Co., 7 Fed. Rep. 793.

such property when acquired, cannot be regarded as any longer a controverted proposition.[1]

§ 144. Exception founded upon convenience and necessity.—The statement that at law a conveyance of that which does not exist is void, is as true now, as ever; but the necessity of giving effect to a lien so provided in order to render possible the accomplishment of great undertakings, by railroad companies has doubtless had something to do in converting what was formerly an equitable doctrine into a rule of law.

"To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed and trust deeds could be given thereon." [2]

But the exception to the rule does not rest solely upon grounds of convenience and public policy. When a mortgage is given of after-acquired property the several items of property as they come into existence become "instantly attached to and covered by the deed" and feed the estoppel created thereby.[3]

§ 145. The lien of the mortgage subject to existing liens.—A mortgage of after-acquired property "can only attach to such property in the condition in which it comes into the mortgagor's hands." [4]

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[1] Jones on Corp. Bonds & Mort. 92. See also Williamson v. New Jersey South. R. R. Co., 29 N. J. Eq. 311, 15 Am. Railw. R. 572; Holyrod v. Marshall, 10 H. L. C. 191; Barnard v. Norwich & W. R. R. Co., 2 Lowell, 608; S. C., 14 Nat. B. Reg. 469; Pennock v. Coe, 23 How. 117; Dillon v. Bernard, 1 Holmes, 386, 394; Butler v. Rahm, 46 Md. 541; Cook v. Corthell, 11 R. I. 482, dissenting opinion; Morrill v. Noyes, 56 Me. 458; Buck v. Seymour, 46 Conn. 156; Parker v. New Orleans, B. R. & V. R. R. Co., 33 Fed. Rep. 693; Bell v. R. R. Co., 34 La. Ann. 785; Boston S. D. & T. Co. v. Bankers' & M. Tel. Co., 36 Fed. Rep. 288.

[2] Galveston R. R. Co. v. Cowdrey, 11 Wall. 459, 481, per Bradley J.

[3] Id.

[4] Fosdick v. Schall, 99 U. S. 235; Porter v. Bessemer Steel Co., 122 U. S. 267; 7 S. Ct. 741; Galveston R. R. Co. v. Cowdrey, 11 Wall. 459; United States v.

The general mortgage does not displace mortgages or other liens to which the property is already subject when it is acquired, whether the mode of acquisition be by grant or by obtaining a controlling interest in the

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N. O. R. R. Co., 12 Wall. 362; Washington, O. & W. R. Co. v. Lewis, 83 Va. 246; 2 S. E. 746; Vilas v. Page, 106 N. Y. 439; 13 N. E. 743; Frazier v. E. T. V. & G. R. Co., 88 Tenn. 138; 12 S. 537; Boston Safe Deposit & T. Co. v. Bankers' & M. Tel. Co., 36 Fed. Rep. 288; Western Un. Tel. Co. v. Burlington, & S. W. Ry. Co., 3 McCrary, 130; Farmers' L. & T. Co. v. V. & M. R. Co., 33 F. 778; Fidelity Ins. Tr. & S. D. Co. v. S. Val. R. Co., 86 Va.1; 9 S. E. 859; 33 W. Va. 761; Meyer v. Car Co., 102 U. S. 1; Branch v. Jessup, 106 U. S. 468. Compare Cent. Tr. Co. v. W. St. L. & P. R. Co., 30 F. 332. See also Un. Tr. Co. v. Morrison, 125 U. S. 591; 8 S. Ct. 1004; Stevens v. Union Tr. Co., 11 N. Y. S. 268; Compton v. W. St. L. & P. R. Co., 45 O. St. 592; 16 N. E. 110; Farmers' L & Tr. Co. v. Newman, 127 U. S. 649; 8 S. Ct. 1364; McIlhenny v. Bing (Tex.) 13 S. W. 655. Under a statute authorizing purchases at a foreclosure sale of railway franchises to re-incorporate themselves the new corporation takes the property and franchises as the same existed at the date of the sale even though further steps may be necessary to perfect the little. Chesapeake I. & S. W. R. Co. v. State, 16 Lea (Tenn.) 688. See also Holland v. Lee, 71 Md. 338; 18 A. 661; Landis v. W. Pa. R. Co., 133 Pa. St. 579. A claim for services and advances on which judgment was not obtained against either an old corporation or its successor until some space after a mortgage had been given by the old and assumed by the new corporation does not take precedence of such mortgage unless given priority by statute. Frogg v. Blair, 133 U. S. 534. A claim of abutting lot owner for damages resulting from construction of road held to be a superior lien to that of mortgage bondholders. Mercantile Trust Co. v. P. & W. R. Co., 29 F. 732. This priority affects not only general mortgages on an entire system but local mortgages on a single branch. Central Tr. Co. v. W. St. L. & P. R. Co., 30 F. 332. But a furnisher of material used in the construction of a bridge has no priority over a prior mortgagee whose mortgage covers future additions. Porter v. Bessemer Steel Co., 122 U. S. 267; 7 S. Ct. 1206. Where the property and franchises of a railroad company covered by a mortgage running to trustees are sold under a judgment obtained for interest on bonds secured by the mortgage, the purchaser takes only the equity of the company and the lien of the mortgage is not divested. Com. v. S. & D. R. Co., 122 Pa. 306; 15 A. 448.

If while the property of a railroad company in the hands of a receiver is being administrated for the benefit of bondholders in a junior deed of trust, suit is brought in the same court against the company by the trustee in an elder deed of trust to foreclose it, the court having jurisdiction of the subject matter has authority to make the purchaser under the first foreclosure sale which was made subject to the prior deed of trust a party defendant and to order substituted service of process upon him, notwithstanding that it is a federal court and that such purchaser is a citizen of the same state as complainant. Farmers' L. & T. Co. v. Houston & T. C R. Co., 44 F. 115. A railway company which is interested in maintaining as a "going concern" a mortgaged connecting line, and which, for that purpose, advances from time to time during a period of

capital stock of another company, and thereby its road, or otherwise.[1] A mechanic's lien for work done and materials furnished in building docks, wharves and piers upon a branch road afterwards acquired by a company was held to take precedence of a general mortgage upon the property owned by it and to be afterwards acquired.[2]

In such a case it cannot be said that the property has been really acquired by the mortgagor except *cum onere;* and the lien of the mortgagee only attaches to his title and interest therein.[3]

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several years the funds necessary to make up the deficit created by the payment of operating expenses, fixed charges and interest on the bonds, does not thereby acquire an equitable priority of the mortgage bondholders who, upon foreclosure of their mortgage, are entitled to have the proceeds of the sale applied to the payment of their claims in preference to the re-payment of the advance. Morgan's L. & T. R. & S. S. Co. v. Tex. Cent. Ry. Co., 11 S. Ct.; Tex. Cent. Ry. Co. Morgan's L. & T. R. & S. S. Co., Id.

[1] Thompson v. W. Val. R. Co., 132 U. S. 68; 10 S. Ct. 29; U. S. Trust Co. v. Wab. W. R. Co., 38 F. 891; Hollister v. Stewart, 111 N. Y. 644; 19 N. E. 782. The fact that debenture bonds are issued to enable the corporation to complete its railroad does not create any trust in favor of creditors whose claims are for supplies furnished in the construction of the road. Pettibone v. Toledo C. & St. L. R. Co., 148 Mass. 411; 19 N. E. 337.

[2] Williamson v. N. J. South. Ry. Co., 23 N. J. Eq. 277, 298; 29 Id. 311.

[3] A company which had made a mortgage covering all future-acquired property, subsequently purchased property stipulating that the United States should have a lien for the purchase money and that the company should not part with it without written consent until paid for.

In an action by the trustee for the bondholders founded upon the claim that the mortgage, being prior in date to the bond, attached to the property as soon as purchased and displaced any junior lien, the United States Supreme Court held that the lien of the mortgage only attached itself to the property in the condition in which it came into the mortgagor's hands and was subject to the lien of the United States. Justice Bradley delivering the opinion said: "If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and, if he purchase property and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction; and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These

§ **146. Prior liens may be lost.**—But liens junior to such general mortgage are lost where the property against which they exist becomes a part of the permanent structure of the road, for instance, rails and bridges.[1] And the case is not altered where the articles become so affixed to the realty by stipulating in the contract under which such articles are furnished that they shall remain the property of the vendor until paid for.[2]

The rule only applies in cases of rolling stock and other property susceptible of separate ownership and of separate liens and of real estate not essential to the use and enjoyment of the railroad. The parties may, however, in some cases, determine by agreement the character to be attached to the property whether of fixtures or personalty so as to preserve the lien of the vendor.[3]

§ **147. Lien of vendor of real estate for unpaid purchase money not disturbed.**—The lien of a vendor of real estate sold to a railroad company whose future-acquired prop-

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laws are intended for the protection of subsequent, not prior, purchasers and creditors. Had the property sold by the government to the railroad company been rails, ... or any other material which became affixed to, and a part of, the principal thing, the result would have been different. But, being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad itself, are unaffected by a prior general mortgage given by the company, and paramount thereto. In the case before us the United States, at the time of making the sale, reserved a lien on the property, and imposed a condition of non-alienation until the price should be paid. Taken altogether, the transaction amounts to a transfer *sub modo*, and the lien must be regarded as attaching to the property itself, and as paramount to any other liens arising from the prior act of the company." United States v. New Orleans R. R. Co., 12 Wall. 362, 265; Boston Safe Deposit & T. Co. v. Bkrs. & M. Tel. Co., 36 Fed. Rep. 288.

1 Porter v. Pittsburgh Bessemer Steel Co., 122 U. S. 267; 7 Sup. Ct. Rep. 1206; 30 Am. & Eng. R. R. Cas. 495.

2 Frank v. Denver & R. G. Ry. Co., 23 Fed. Rep. 123; West. U. Tel. Co. v. Burlington & S. W. Ry. Co., 3 McCrary, 130; 11 Fed. Rep. 1; Cent. Trust Co. v. Ohio C. R. R. Co., 36 Fed. Rep. 520.

3 Boston Safe Deposit & T. Co. v. Bankers' & M. Tel. Co., 36 Fed. Rep. 288; West Un. Tel. Co. v. B. & S. W. R. R. Co., supra.

erty is subject to a mortgage, holds good as against the mortgagee. He is not regarded as a purchaser for value, as against the vendor's lien for unpaid purchase-money.[1]

So land taken under the power of eminent domain does not become the property of the company or subject to a mortgage upon the after-acquired property until paid for.[2]

§ 148. Conditional sales generally invalid as against subsequent mortgagee.—But upon the same principle that property acquired and annexed to the realty becomes divested of the lien of the vendor, property passing to a company under a conditional sale is usually regarded as the absolute property of the company, as between the vendor and subsequent mortgagees without notice, notwithstanding the condition that the title shall remain in the vendor until it is paid for. This may be said to be universally true where a mortgage was given after the property was so acquired; and also in states where there are statutes requiring that conditional sales shall be recorded in order to hold good as against subsequent purchasers for value and such recording is neglected.

§ 149. Limitations of this rule.—This rule relates specially to personalty. It is not extended, however, beyond the reason upon which it rests, namely, the prevention of fraud. Thus where the contract was for sale of railroad iron which, under the agreement, was placed upon and annexed to a specified portion of the track, so that it was easy of identification, and was to remain the property of the vendor, and not to

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[1] Loomis v. Davenport & St. P. R. Co., 17 Fed. Rep. 301.

[2] Buffalo N. Y. & P. R. R. Co. v. Harvey, 107 Pa. St. 319; 26 Am. & Eng. R. R. Cas. 642.

become the property of the company until paid for, a subsequent mortgagee with notice of the agreement and its conditions was held not to have any interest in such property as against the vendor.[1]

Whether such conditional sales of personal property to a company after the execution of a mortgage covering after-acquired property are valid, depends to a great extent, upon the *lex rei sitæ* both as between the vendor and the mortgagee and as between the latter and the attaching and execution creditors of the company;[2] and in the absence of proof to the contrary such personal property will be presumed to have been at the time of the execution of the mortgage in the state where the corporation was organized and where the mortgage was executed.[3]

§ 150. Agreements amounting to a loan on the property not binding upon mortgagee of after-acquired property. —Courts will not permit mortgagees of after-acquired property to be deprived of their substantial rights under the mortgage by any contrivance which, in effect, amounts to a loan secured by a lien which, if given effect, would exclude the lien provided for in the mortgage and deprive the mortgagee of the benefits of the terms with respect to property to be afterwards acquired.

The legal effect of such transactions will be determined from the intention of the parties and the circumstances connected with it, and not by the name the

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[1] Haven v. Emery, 33 N. H. 66.

[2] See Hervey v. R. R. Locomotive Works, 93 U. S. 664; Nichols v. Mase, 94 N. Y. 160; Green v. Van Buskirk, 5 Wall. 307; Kneeland v. Am. L. & Tr. Co., 136 U. S. 89; Rogers Locomotive Works v. Lewis, 4 Dill. 158; Farmer's L. & Tr. Co. v. C. & A. R. Co., 42 F. 6; Hart v. Barney & Smith Mfg. Co., 7 Fed. Rep. 543, 550; Homans v. Newtop, 4 Fed. Rep. 880, 885; Hirschorn v. Canney, 98 Mass. 149; Bank v. McLeod, 38 O. St. 174; Jones on Chattel Mortg., sec. 305.

[3] Nichols v. Mase, 94 N. Y. 160; Jones on Corp. Bonds and Mort., sec. 135.

parties have given it. The arrangements which car-trusts have made with railroad companies having for their real object the making of loans to the companies have, when made the subjects of actions, furnished some valuable and instructive expositions of this principle.[1]

§ 151. Construction of authority to mortgage.—The power given to a railroad company in its charter, or by general law, to mortgage its "entire road, fixtures and equipments with all the appurtenances, income and resources thereof" includes the right to mortgage the franchise of the corporation to maintain the road and receive compensation for the transportation of persons and property and of property connected with the operation at the time of the execution of the mortgage or acquired by the corporation subsequently, in the use of such franchise but not the franchise of being a corporation.[2]

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[1] In Heryford v. Davis, 102 U. S. 235, it appeared that a manufacturer of cars had contracted to loan certain cars to a railroad company for hire at a stipulated price, payable in instalments for which the company executed its notes on the payment of which the car-trust was to release the company, and on default in the payment of the notes, the car company might, at its option, re-take the cars and sell them, retaining for its own use, all payments received up to that time, keeping the amount unpaid out of the proceeds and returning the surplus if any, to the railroad company. It was held that the transaction was not a loan of the cars but a hypothecation to secure the price of them. Justice Strong said:—"The form of the instrument is of little account. Though the contract industriously and repeatedly spoke of loaning the cars to the railroad company for hire for four months, and delivering them for use for hire, it is manifest that no mere bailment for hire was intended. . . . We can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, that the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtor for the price. Notwithstanding, the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale." See also Cent. Tr. Co. v. Ohio C. R. R. Co., 36 Fed. Rep. 520; Frank v. Denver & R. G. R. R. Co., 23 Fed. Rep. 123; Boston, etc., Trust Co. v. Bankers & E. Tel. Co., 36 Fed. Rep. 288; Hervey v. Locomotive Works, 93 U. S. 664; Fidelity Ins. Co. & S. D. Co. v. Shenandoah Val. R. R. R. Co., 86 Va. 19, S. E. Rep. 759.

[2] Meyer v. Johnson, 53 Ala. 237, 325; infra, § 548.

Legislative authority to mortgage for one purpose cannot be so construed as to authorize a mortgage for a different purpose,[1] or a purpose foreign to that for which the corporation was formed.[2]

The acquisition of the franchise of being a corporation is not essential to the beneficial use and enjoyment of property, rights and franchises conveyed. The latter may as well be exercised and enjoyed by a natural person as a corporation. The franchise of being a corporation belongs to the members while the powers and privileges vested in and to be exercised by the legal entity called the corporation belong to it as such, and may be transferred to another under such statutory authority.[3]

§ 152. When right of eminent domain does not pass.— The right to institute judicial proceedings for the condemnation of land is not a franchise but an incidental means to the enjoyment of the franchises granted to a

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1 Frazier v. E. T. & V. & G. R. Co., 88 Tenn. 138.

2 City of Chicago v. Cameron, 22 Ill. App. 91; affd. 120 Ill. 447. For construction of authority to issue mortgage bonds on road in course of construction as completed in ten-mile sections, see D. & R. G. R. Co. v. U. S. Tr. Co., 41 F. 720. A statute authorizing a railroad company to borrow money for construction purposes held to authorize mortgage of property to be acquired in the future to which the mortgage lien attaches as soon as it is acquired. Parker v. N. O. B. & V. R. Co., 33 F. 693. Power to issues its own bonds contained in the charter of a railroad company confers power to guarantee and secure the bonds of another company received by the former in payment of a debt and transferred by it for value. Rogers L. & M. Wks. v. So. E. R. Ass'n, 34 F. 278.

The validity of a mortgage by a corporation formed and existing in more than one state will be determined according to the law of the state where it is executed. The Shenandoah Valley R. R. Co., was first incorporated by the State of Virginia and its charter was afterwards confirmed and similar powers were given it in the states of Md. and W. Va. It was held that statutes of the latter two states limiting the indebtedness of a corporation to the amount of its capital stock would not render void bonds issued in excess thereof, if valid in Virginia. Atwood v. Shenandoah Val. R. Co., 85 Va. 966; 9 S. E. 748.

3 Memphis, etc., R. R. Co. v. Commrs., 112 U. S. 609; Eldridge v. Smith, 34 Vt. 484; Joy v. Jackson, etc., Pl. R. Co., 11 Mich. 155; Bank of Middlebury v. Edgerton, 30 Vt. 182; Smith v. Gower, 2 Duvall, Ky. 17.

railroad company. Being the power of eminent domain, it cannot be made the subject of grant or sale.[1] The real transaction in cases of transfer and consolidation is nothing more nor less and nothing other than a surrender or abandonment of the old charter and its franchises by the corporators, and a grant *de novo* to the transferrees or purchasers. The law authorizing the transfer and prescribing its mode and effect is the grant of a new charter to take effect upon the condition of the surrender or abandonment of the old charter.[2]

§ 153. Discrimination between corporations and individuals.—An individual as well as a corporation, may build a railroad, or construct a line of steamers and collect tolls thereon, and notwithstanding the public character of the business may transfer his right to another. But a corporation exercises these public privileges by virtue and authority of a charter granted by the state, and cannot convey them away without legislative permission.

Different reasons have been urged for the rule that there is a difference in this respect between corporations and individuals. It has been said that the delegation to it of the power of eminent domain creates an obligation to the state on the part of the corporation that the property acquired under the power shall be held and used solely for the benefit of the public. But all or part of the right of way may be acquired without resorting to the power; and purchasers under a foreclosure would seldom find it to their interest to devote the property to a different use than the original.[3]

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[1] Coe v. Columbus, etc., R. R. Co., 10 O. St. 372. Contra, Lawrence v. Morgan's L. & T. R. & S. S. Co., 39 La. Ann. 427; 2 So. 69.

[2] State v. Sherman, 22 O. St. 411.

[3] The obligation arising from the exercise of the power of eminent domain as

But a better and the true reason for the rule would seem to be that the benefits secured to the public by the terms of the grant, and the exercise of the franchise of collecting fares, freights and tolls are in the case of a railroad or similar corporation considerations so mutually dependent, and such franchises assimilate so nearly to the prerogative character of being a corporation that they are to all practical intents and purposes inseparable.[1]

§ 154. Cases holding that no legislative permission is required.—The view that railroads and other corporations whose operations are public, cannot mortgage their franchises and property employed in such operations without legislative enabling acts is not accepted in all the states.

It has been held in several cases that the right to incur debts in the transaction of business which is as necessary to railroads as to other corporations carries with it the incidental right to borrow money to construct the road and for other legitimate uses and to mortgage its property to secure the same to the same extent as in the case of other private corporations, and without any special legislation for that purpose.[2]

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a reason for the rule was thus stated by Hoar, J., in a case before the Supreme Court of Mass.—" In the case of a railroad company, created for the express and sole purpose of constructing, owning and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties; the discharge of which is the leading object of its creation; required to make returns to the legislature, ... there are certainly great and, in our opinion, insuperable objections to the doctrines that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation." Commonwealth v. Smith, 10 Allen, 448, 455.

[1] See Gardner v. London C. & D. Ry. Co. L. R., 2 Ch. App. 201, 212.

[2] Miller v. Rutland & W. R R. Co., 36 Vt. 452, 492; Kelly v. Alabama & C. R. R. Co., 58 Ala. 489; Savannah & M. R. R. Co. v. Lancaster, 62 Ala. 555; Memphis & L. R. R. R. Co. v. Dow, 22 Blatchf. 48.

Another argument upon which these cases rest, is that the change which takes place in case of a foreclosure and sale under a mortgage is no greater than that which is constantly taking place by the sale and transfer of shares within the corporation itself, by which an entirely new body of members may, in the course of a short time, be substituted for the original corporators; and that the public interest is no more endangered by a complete novation at once than by a gradual change.[1]

Again it is urged that the change which takes place in the active management and legal control after a sale under foreclosure or otherwise of the privileges conferred by a railroad franchise is no more dangerous to the public interests than the change of the management liable to be made at any time by the election of new officers and directors by the stockholders.[2]

§ **155. The tendency of legislation.**—The decided tendency of legislation is to place railroad corporations on the same footing with other private corporations with respect to their private and internal management, while absolutely directing and controlling all their

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[1] Shepley v. Atlantic & S. L. R. R. Co., 55 Me. 395; Memphis & L. R. R. R. Co. v. Dow, 22 Blatchf. 48.

[2] Shepley v. Atlantic & S. L. R. R. Co., 55 Me. 395, 407, per Walton, J.; Kennebec & P. R. R.Co. v. Portland & K. R. R. Co., 59 Me. 9, 23. In a case before the Supreme Court of Vt., Barrett, J., considered that the idea because the franchise is conferred upon a particular body of men constituting the corporation a special confidence in them that they will answer the trusts in behalf of the public is implied as altogether fanciful and theoretical. He declared that from the nature of the case, there could not be such confidence implied for the reason that it lies with the shareholders of the capital stock to say who shall compose the corporation at any given time. Miller v. Rutland & M. R. R. Co., 36 Vt. 452, 492. See also Bickford v. Grand Junc. Ry. Co., 1 Sup. Ct. of Canada R. 696, 738; citing Hall v. Sullivan R. R. Co., 21 Law Rep. 138, per Curtis, J.; Wilmington R. R. v. Reid, 13 Wall. 264, 268; Memphis & L. R. R. Co. v. Dow, 22 Blatchf. 48.

operations which strictly concern the public, and to provide by general laws for the mortgaging of their property and franchises subject to suitable restrictions when necessary to secure their construction and completion. In view of this tendency it cannot be very material which view of the question just considered is correct. If, however, the right is possessed by them independent of statute then each act of the legislature granting the right and prescribing the conditions upon which it may be exercised must be regarded with respect to such prescriptions as a limitation upon the right. For instance, an express authority given to mortgage up to a certain amount has the effect of a negation upon an implied authority to mortgage for any greater amount.[1]

§ **156. What property subject to mortgage.**—Not only the existing tangible property but future assets, as book debts accruing but not due, and property to be thereafter acquired, may be mortgaged as security for indebtedness incurred in the transaction of the corporate business, where no rule of law is infringed nor the rights of third parties prejudiced.[2] The rule of the common

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[1] Brice's *Ultra Vires*, 2nd Eng. Ed. 273. But where authority has been conferred by a statute or by the charter of a company to mortgage its property, it is the proper judge of the condition of its affairs which will necessitate and justify the giving of a mortgage, and a creditor of the company cannot interfere with the exercise of the right unless he can show that his rights will be thereby prejudiced. Reed v. Bradley, 17 Ill. 321.

[2] Benjamin v. Elmira R. R. Co., 49 Barb. (N. Y.) 441; Bloomer v. Union Coal, etc., Co. L. C., 16 Eq. 383; In re Marine Mansions Co. L. C. 4 Eq. 601; Parker v. N. O. B. R. R. Co., 33 F. 693; Tex. W. R. Co. v. Gentry, 69 Tex. 625; 8 S. W. 98; Willink v. Andrews, (Ind.) 16 C. L. J. 201; Pennock v. Coe, 23 How. 117; Speis v. Chicago & E. R. Co., 40 F. 34; holding that future income may be mortgaged; Williamson v. New Alb., etc., R. R. Co., 1 Biss. 198; Pierce v. Milwaukee, etc., R. R. Co., 24 Wis. 551; U. S. v. New Orleans R. R. Co., 12 Wall. 362; Shaw v. Bill, 95 U. S. (5 Otto) 15; Centr. Trust Co., v. O. Centr. R. Co., 36 F 520; Meyer v. Johnston, 53 Ala. 324; Butler v. Rahm, 49 Md. 541; Morrill v. Noyes, 56 Me. 458; Coe v. Brown, 22 Ind. 252; Stevens v. Watson, 4 Abb. Ct. of App. Decis. 302; Phil., etc., R. R. Co., v. Woelpper, 64 Pa.

law that nothing can be mortgaged not in existence and belonging to the mortgagor at the time of making the mortgage does not apply to the future stock in trade of trading and manufacturing corporations. But future calls cannot be mortgaged.[1]

§ **157. Gas and other companies not restricted.**—Companies engaged in furnishing gas, water and other necessary commodities to the inhabitants of cities and districts, are under no such restrictions in the matter of mortgaging their property and franchises as railroad companies. The restriction upon the common law right of alienation of property arises not from the fact that it subserves a public use and is beneficial or that the business of the corporation is the supplying of a public necessity, but applies only when the state, in view of the public purpose of a corporation, has conferred upon it special privileges, one of the most important of which is the right of eminent domain.[2]

§ **158. True test of the right to mortgage.**—In all cases where the alienation of franchises and property would disable a corporation from performing its public duties and is forbidden, the same policy likewise forbids the same being mortgaged. The right to sell includes the right to mortgage and the giving of a mortgage may in the end, amount to a sale. A manufacturing company may sell its mill and buy another ; but a railroad company cannot make a new railroad at pleasure, or a canal company a new canal at pleasure.[3]

St. 366; Dunham v. Isett, 15 Ia. 284; Williamson v. N. J., etc., R. R. Co., 29 N. J. Eq. 314. See Moran v. P. C. & St. L. R. Co., 32 F. 878, where the mortgage was held not to cover after-acquired property.

[1] Lewis v. Glenn, 84 Va. 947; 6 S. E. 866; King v. Marshall, 33 Beav. 565.

[2] Jones on Corp. Bonds and Mort., sec. 6.

[3] Com. v. Smith, 10 Allen, 448, 455; per Justice Hoar. See East Boston Freight R. R. Co. v. Eastern, R. R. Co., 13 Id. 422; Richardson v. Sibley, 11 Id. 65.

A railroad company cannot convey,[1] or lease its track and right of way or other property which is essential to the fulfilment of the duties imposed upon it by the charter.[2] But back debts already made whether due or not, may be mortgaged where the corporation has general authority to borrow, or where the funds to be obtained by the assignment are necessary to the successful continuance of its business.[3]

§ 159. Statutes authorizing mortgages of railroad property. — Most of the American states have provided general laws authorizing railroad companies to mortgage their property, and such franchises as can be mortgaged. The other kinds of corporations which require legislation to legalize the conveyance of their property, and other franchises than that of being a corporation, which none can convey are not numerous. Canal companies may be mentioned as the most important; and few, if any, of these are located where special legislation is disallowed. It is fortunate, in view of the general and interstate importance of the subject that there is considerable uniformity of the statutes of the different states.

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[1] Penn. Co. v. St. Louis & T. H. R. R. Co., 118 U. S. 290, 309; Richards v. Merrimac & C. Riv. R. R. Co., 44 N. H. 127, per Bell, C. J.; Naglee v. Alexandria & F. Ry. Co., 83 Va. 707; Gulf C. & S. F. Ry. Co., v. Morris, 67 Tex. 692; 4 S. W. 156.

[2] Abbott v. Johnstown R. R. Co., 80 N. Y. 27; Troy & B. R. R. Co. v. Boston H. T. & W. Ry. Co., 86 N. Y. 107; Internat. & G. N. R. R. Co. v. Underwood, 67 Tex. 589; Marie v. Garrison, 13 Abb. N. C. (N. Y.) 210; Central & M. R. R. Co., v. Morris, 68 Tex. 49; Thomas v. R. R. Co., 101 U. S. 71; Oregon Ry. Co., 130 U. S. 1.

[3] In re Humber Iron Wks. Co., 16 W. R. 474, 667; In re Sankey Brook Coal Co., L. R. 9 Eq. 721; In re Life Assur. Co., L. R. 10 Eq. 312; King v. Marshall, 33 Beav. 565. See Pullman v. Cinn. etc., R.R. Co., 5 Biss. 237; Dunham c. Isett, 15 Iowa, 284; State v. Northern Cent. R. R. Co., 18 Md. 193; holding that a mortgage may be made of future earnings and profits; also Crewer, etc., Min. Co., v. Williams, 14 L. T. N. S. 93; Conrad v. Atl. Ins. Co., 1 Pet. 386; where mortgages of property for future advances were sustained.

It would be a most desirable consummation if there existed a complete agreement among all the states, as the matter is of constantly increasing interest. No special notice can be taken of the statutes of the several states. Power is given by statute in most of the states, to those who have become the purchasers of railroad property, to organize themselves into corporations for exercising the franchises and managing the property so acquired.[1]

§ 160. Forms of corporate mortgages.—The most usual method resorted to for securing bonds and other evidences of indebtedness issued by railroad companies on their property and franchises is the execution of a deed of trust.[2]

A trust deed is in legal effect a mortgage. The legal estate is in some states held to be conveyed by it to the trustee; in others not.

At any rate, by the usual terms of the deed, it may be considered that for all practical purposes the mortgagee holds at most, a mere naked legal title while the beneficial and equitable interest is in the beneficiaries. The latter, in a deed of trust made to secure bonded indebtedness, are constantly changing as the bonds for the security of which the conveyance is made are generally held by parties widely scattered and are daily dealt with and negotiated in the markets of the world.

The deed of trust usually contains a power of sale, but the power is seldom resorted to upon default. From the necessities of the case the beneficiaries being widely separated and unable to come to concert of agreement, it is the usual course for one of the bond-

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[1] In such re-organization the purchasers held not bound to conform to statutory provisions governing the increase of capital stock. Memphis & L. R. R. Co. v. Dow, 120 U. S. 287; 7 S. Ct. 482.

[2] See Am. L. & Tr. Co. v. E. & W. R. Co., 37 F. 242; Hollister v. Stewart, 111 N. Y. 644.

holders to file a bill in equity on behalf of himself and all others making the corporation and the holders of any adverse liens parties defendant. In such proceeding the rights and equities of all parties are easily adjusted.

§ 161. What property covered by a railroad mortgage.— In England, it is not usual to embrace in a mortgage given by a railroad company, the actual property *eo nomine*, but the railroad as a completed whole or as it is termed the "undertaking." This term embraces the enterprise considered as an entirety apart from the ingredients which constitute it, although it in effect embraces the latter. It comprehends the whole scheme and instrumentalities by which tolls and profits are earned.[1]

But in this country, where the danger that the enterprise will not be kept intact as a going concern is not considered so great, or the consequences from a failure in that respect so deplorable as in England, legislative authority exists in charters granted by congress and by the states, and under general laws in most of the states as we have seen, to encumber not only future earnings but the franchises and actual property.[2]

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[2] Perkins v. Pritchard, 3 R. & Cor. Cas. 95; Hart v. East. Un. Ry. Co., 6 Id. 818; 7 Exch. 246, 265. See also L. R. & F. T. S. R. Co. v. Huntington, 7 S. Ct. 517; M. & N. R. Co. v. B. L. Wks., 7 S. Ct. 1094. In Gardner v. London C. & D. Ry. Co., L. R. 2, Ch. App. 201, 217, Lord Cairns said:—"The undertaking is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete, or to be completed, as a 'going concern' with internal and parliamentary powers of management not to be interfered with,—as a fruit-bearing tree,—the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the legislature must not, under a contract pledging it as a security, be destroyed broken up or annihilated."

[2] A mortgage of a road "with its corporate privileges and appurtenances,"

§ **162. Apportionment of earnings while property encumbered.**—Where a system of roads is covered by general mortgages, and some of its branches by local underlying mortgages, the earnings of the system should, as a rule, be apportioned among the different divisions, for payment of taxes and interest on underlying mortgages, upon a mileage basis.[1] But the ordinary rules of

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passes only such property as is dirctly appurtenant to the road and is indispensable to the enjoyment of its franchises. State v. Glenn, 18 Nev. 34; Morgan v. Donovan, 58 Ala. 241. Without specification, such a mortgage does not cover town lots adjacent to the road, unless as matter of fact, such lots are essential to the enjoyment of the corporate franchises; Alabama v. Montague, 117 U. S. 602; Boston & N. Y. Air Line R. R. Co. v. Coffin, 50 Conn. 150; Miss. Val. Co. v. Chicago St. L. & N. O. R. R. Co., 58 Miss. 896; Millard v. Bailey L. R., 1 Eq. 378; nor a hotel, Miss. Val. Co. v. Chicago St. L. & N. O. R. R. Co., supra, unless the same be used in connection with the road and for its convenience, for instance, for the accommodation of the patrons and employés of the road. United States Trust Co. v. Wabash St. L. & P. Ry. Co., 32 Fed. Rep. 480. A mortgage of "all the franchises, lands and appointments of the main line then owned by the company or thereafter to be acquired" does not cover a lateral branch or extension built subsequently to the execution of the mortgage. Alexandria & F. Ry. Co. v. Graham, 31 Gratt (Va.), 769; Randolph v. N. J. West Line R. R. Co., 28 N. J. Eq. 49; Hodder v. Ky. & G. E. Ry. Co., 7 Fed. Rep. 793. A mortgage of the main line of a railroad and its appurtenances located in a certain state, does not cover real estate, depot buildings and trackways situated in another state, though the same be important and valuable as adjuncts and appurtenances of enjoyment of the principal enterprise. Buck v. Memphis & L. R. R. R. Co., 4 Cent. L. J. 430. But a mortgage which expressly covers a line of railroad constructed or to be constructed between the named terminii together with all the stations, depot grounds, engine houses, etc., appertaining to the line of railroad, creates a lien on its terminal facilities in the cities constituting its terminii. Centr. Tr. Co. v. Kneeland, 11 S. Ct. 357. A mortgage of all the property used, or to be used in the construction and management of its road was held not to pass property which the company was not authorized by its charter to acquire; as where the property had been acquired from an opposition steamship line and withdrawn from business in order to prevent competition, the property never having been used nor intended for use by the company in connection with its railroad or as appurtenant thereto. Morgan v. Donovan, 53 Ala. 241. It would have been otherwise if the mortgage had contained an apt description of the property so acquired and held and an intention to include it had been made apparent. The doctrine of *ultra vires* has no application in favor of or against either party to the mortgage. Infra, § But subsequent change of the route from that in contemplation at the time a mortgage is given on the franchise of a railroad company, and all the property to be acquired will not prevent the lien of the mortgage attaching to the road as built and all its franchises and appurtenances. Elwell v. Grand St. & N. R. R. Co., 67 Barb. 83.

[1] Cent. Tr. Co. v. W. St. L. & P. R. Co., 30 F. 332.

business should be observed and a larger proportion of the earnings may properly be expended upon one division than upon others, in case it is necessary to the general prosperity of the system as a whole.

The income should be devoted to operating expenses with necessary preference to payment of interest on bonded indebtedness.[1] But where no prior diversion of the earnings from operating expenses to interest, is shown the operating expenses are not entitled to payment out of the proceeds of a foreclosure, sale.[2]

§ 163. **How far governed by intention of parties.**—The intentions of the parties are always important in determining whether collateral or subsequent structures and improvements should be subjected to the lien of a mortgage. No departure from the original plan, however wide, should be allowed to deprive a mortgagee of security for his advances made on the faith of the original enterprise; if a construction extending it to collateral structures would do no violence to the expressed intention of the parties. On the other hand, if the mortgagee has obtained substantially the security bargained for in the instrument, he will not be allowed

[1] Farmer's L. & T. Co. v. V. & M. R. Co., 33 F. 778.

[2] St. L. A. & T. H. R. Co. v. C. C. C. & I. R. Co., 125 U. S. 658; 8 S. Ct. 1011, holding also that this rule applies to a claim for rent due for a leased line. See Barry v. M. K. & T. Ry. Co., 36 F. 228; Dow v. M. & L. R. R. Co., 124 U. S. 652; 8 S. Ct. 673; Sage v. Same, Id. 887. Where a general mortgage has been given on the *corpus* of a railroad company's possessions, the utmost right that income bondholders are entitled to after foreclosure and sale under the former and failure to realize enough to pay the amount found due is the right to redeem from the sale already had, and on failure to do so within the time limited in the decree therein right will be forever barred. Simmons v. Taylor, 38 F. 682. See Penn. R. Co. v. Alleghany C. & I. R. Co., 42 F. 82. Under the provisions of Stat. 20, at large, U. S. (the Turman Act), it was held that expenses for improvement of the road, buildings and equipments whereby the capital stock was increased in value were not to be deducted from gross earnings of the Pacific Railroads. U. S. v. Centr. Pac. R. Co., 11 S. Ct. 285.

to avail himself of the result of an independent undertaking which could by no possibility have been in contemplation of either party at the time the mortgage was made. Nor should the terms of a mortgage ever be extended by construction, so as to affect property rights of third parties.[1]

§ 164. **Repairs and additions and uncalled-for subscriptions must be specially mentioned.**—Canal and ferry boats owned by a railroad company and used to connect separate portions of its track, do not constitute portions of the track, so as to pass under a mortgage of the railroad proper with its rolling stock. They would be included, however, in a mortgage containing a general description of other property in addition to that of the railroad proper.

Boats owned and used by a company in connection with its road beyond a terminus of the road were held not to pass without more specific description than "all other personal property whatsoever, in any way belonging or appertaining to the said road."[2]

Claims for unpaid subscriptions are not debts until a call has been made for payment, and consequently would not pass by a mortgage of any "and all the property" of a company without special mention. Nor would mere equitable rights be included in such general description. They may be made the subject of a mortgage, but should be described both in the deed

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[1] In Mitchell v. Amador Canal Co., 75 Cal. 464; 17 P. 264, the mortgage described a water ditch as lying between terminii and it was held not to pass a new and independent ditch subsequently constructed along a different course by a purchaser from the mortgagor of the mortgaged property *pendente lite* although the subsequent improvement was to be used in place of the mortgaged ditch but not as an appurtenant of, nor as an improvement on the original. See also Willink v. Morris, etc., Canal Co., 3 Green Ch. (N.J.), 377; Herman v. Deming, 44 Conn. 125.

[2] Parrish v. Wheeler, 22 N. Y. 494.

and advertisement of the sale under it. Without such a description in the notice of such sale as is calculated to impart to purchasers a definite idea of what they are buying, no title is conveyed.[1]

§ 165. **Mortgages of tolls and income.**—It is now well settled that the right to receive and apply the income from the exercise of the franchises and use of the property follows the possession. The right to collect tolls and freights is the most valuable of all the property rights of common carriers and the production of an income is the most important, if not the sole, end and aim. They are susceptible of being conveyed away for a specified period, but cannot be permanently separated from the possession and use of the property out of which they arise.

Where, however, the mortgagee is given possession in the first instance, the income and tolls may be subjected to his lien; but without such provision, express or implied, the mortgagor remains in possession and is not bound to account for them, though they may be specified as a part of the property upon which the mortgage lien is created.[2]

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[1] Milwaukee & M. Ry. Co. v. M. & N. R. R. Co., 20 Wis. 174.

[2] In a case before the Supreme Court of the United States, Justice Swayne in delivering the opinion said:—"Possession draws after it the right to receive and apply the income. Without this, the road could not be operated, and no profit could be made. Mere possession would be useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it." Gilman v. Ill. & M. Tel. Co. 1 McCrary, 170; S. C. 91 U. S. 603, 617. See also Gilbert v. Washington City & G. S. R. R. Co., 33 Gratt. (Va.), 645, 649; Frayser v. Richmond & A. R. R. Co., 81 Va. 388; Lehman v. Tallahassee Mfg. Co., 64 Ala. 567; In re Life Ass'n, 96 Mo. 632; Freedman's Sav. Co. v. Shepherd, 127 U. S. 494. The same conclusion was reached in a subsequent case in the same court where a bridge company had mortgaged the rents, issues and profits of its bridge as far as the same should not be required to pay the

§ 166. **Not subject to attachment after being set apart.**— But it is held that if a portion of the income or proceeds of business has been set apart by a company for the payment of interest on its bonds or as a sinking fund for their redemption under an agreement with the mortgagees to that effect, the same is not subject to attachment by a creditor of the company.[1] The fund so set apart is no longer income which is uncertain and contingent upon successful and economical management, but specific property to which the right of the mortgagee at once attaches under the agreement.[2]

In the absence, however, of such agreement and sequestration, the mortgagee out of possession has no lien which is capable of enforcement upon the moneys in the hands of the company. And previous to foreclosure or possession taken by the trustee the earnings of a railroad company are liable to garnishment, although included in the mortgage, where this provides that until default the company may remain in the possession and use of the road and reserve the rents and profits arising from it.[3]

§ 167. **Contracts based upon immoral consideration.**—Contracts void for immorality because prejudicial to public interests and against public policy cannot properly be

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necessary expenses of keeping it in repair and operating it. Am. Bridge Co. v. Heidelbach, 94 U. S. 798. See also Day v. Ogdensburg & L. C. R. Co., 107 N. Y. 129; 13 N. E. 765; C. & I. R. Co. v. Pyne, 30 F. 86, holding that where bonds had 30 years to run the company had no right to redeem the bonds therefor, before maturity by accumulating a sum from net earnings set aside for that purpose.

[1] Galena & Chicago Un. R. R. Co. v. Menzies, 26 Ill. 121.

[2] Id.

[3] Bath v. Miller, 51 Me. 341; 53 Me. 308; Smith v. East R. R. Co., 124 Mass. 154; Noyes v. Rich, 52 Me. 115, overruling Woodman v. York & Cumberland R. R. Co., 45 Me. 207; De Graff v. Thompson, 24 Minn. 452; Miss. Val. & W. Ry. Co. v. U. S. Express Co., 81 Ill. 534.

said to be *ultra vires* except as that term may be applied to all persons natural as well as artificial. But as the term has been frequently used in connection with contracts of that character entered into by corporations it is necessary to give it brief attention. A fair illustration of this class of contracts are those made with the object of inducing or influencing legislation.[1] The principle of the decisions on this class of contracts has no respect to equities between the parties but is controlled solely by public considerations connected with the tendency of the contract. Nor will courts disturb or be influenced by the relative conditions and situations of the parties where they are *in pari delicto;* but will give full operation to the maxim *in pari delicto melior est conditio possidentis.* But the general rule in regard to contracts which are not immoral, or where there are no other reasons of public policy why courts should refuse to grant relief, but are simply illegal and unenforceable on account of some statutory or common law prohibition, is that either party to them who has

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[1] In Marshall v. Balt. & O. R. R. Co., 16 How. 314, plaintiff sued to recover the sum of fifty thousand dollars alleged to be due him by defendant under special contract for his services in obtaining a law from the legislature of Va. granting to the company a right of way through Va. to the Ohio River. In delivering the opinion of the court in favor of the defendant, Justice Greer said:—"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals, or public policy; or which tends to corrupt or contaminate by improper influences, the integrity of our social institutions. * * * * Public policy and sound morality do therefore, imperatively require that courts should put the stamp of their disapprobation on every act and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." See Powers v. Skinner, 34 Vt. 217; Clippinger v. Hepbaugh, 5 W. & S. (Pa.), 315; Wood v. McCann, 6 Dana, (Ky.), 366; Harris v. Roofw. Extrs. 10 Barb. 489; Rose v. Traux, 21 Id. 361; Bryan v. Reynolds, 5 Wis. 200; Mills v. Mills, 40 N. Y. 543; Fuller v. Dame, 18 Pick. 479; Frost v. Belmont, 6 Allen, 153.

received anything from the other party and has failed to perform the agreement on his part must account to the other for what has been so received. And the courts will always compel the guilty party to account for whatever he has received under a prohibited and void agreement where the other party is innocent of any wrong.

These principles have been repeatedly applied in actions growing out of contracts entered into by corporations. Though illegal and unenforceable as contracts, a recovery of the consideration received has generally been allowed where higher public considerations than the immediate equities between the parties were not involved.[1]

§ **168. Corporation cannot purchase shares in itself.**—A purchase of shares in itself by a corporation would be *ultra vires* wherever and whenever the effect would be to diminish its capital and lessen the security of creditors.[2] Where the business yields a profit it would undoubtedly be beneficial to the remaining shareholders by increasing the relative amount of their interest; but if it were established law that this might be done, it would furnish a means by which a corporation could distribute its entire capital and leave its creditors wholly unsecured. There is no more reason however, why a corporation should not purchase shares in itself out of profits than the shares of any other com-

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[1] Case of the Reciprocity Bank, 22 N. Y. 9, 17; Tracy v. Talmage, 14 N. Y. 162, 191; Oneida Bank v. Ontario B'k, 21 N. Y. 490, 496; Curtis v. Leavitt, 15 N. Y. 14, 15, 95; White v. Franklin B'k, 22 Pick. 181; Epis. Soc. v. Epis. Ch., 1 Pick. 373; Whitney v. Peay, 24 Ark. 22; Phil. Loan Co. v. Towner, 13 Conn. 249; Foulke v. San Diego & R. R. Co., 51 Cal. 365; Farmers' Loan & Trust Co. v. St. Joseph, etc., R. R. Co., 1 McCrary, 247; Vanatta v. State B'k, 9 O. St. 27; United States Express Co. v. Lucas, 36 Ind. 361; See In re Cork, etc., Ry. Co. L. R., 4 Ch. 748.

[2] Clapp v. Peterson, 104 Ill. 26.

pany if its charter authorizes it, provided by so doing, its capital be not diminished.[1]

But the irresistible weight of authority supports the rule that where the capital or assets would be reduced by so doing the corporation cannot become the purchaser of shares in itself.[2]

It is sometimes said that shares have a market value and under the power to buy and sell personal property there can no more be an injury done to the stockholders and creditors, by allowing the corporation to deal in its own shares than in those of other corporations. But a departure from the general rule of prohibition against the exercise of such a power, besides placing the fund provided for the security of profits to the shareholders and the debts of creditors at the mercy of the agents, would, in every case of purchase and re-sale directly diminish the capital to the extent of all sums due on the shares, or if fully paid up would reduce the number of persons answerable for losses and increase the consequent burdens upon the remaining shareholders.[3]

This object is sometimes accomplished by purchasing and holding shares in the name of a trustee who thereby becomes the legal owner and responsible for calls, while the corporation retains the beneficial inter-

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1 First Nat. B'k v. Salem F. M. Co., 39 F. 88; Rollins v. Shaver W., etc., Co., 80 Ia. 380; 45 N. W. 1037.

2 Currier v. Lebanon Slate Co., 56 N. H. 262; Coppin v. Gremlers, 38 O. St. 275; Koeles v. Cochran, 22 Kans. 405; State v. Oberlin Bldg. Ass'n, 35 O. St. 258; German Sav. B'k v. Wulfekuhler, 19 Kans, 60; Johnson v. Bush, 3 Barb. Ch. 207; Re Marseilles Extension Ry. Co. L. R., 7 Ch. 161; Gill v. Bates, 72 Mo. 424; Zuluetta's Claim L. R., 5 Ch. 444; Barton v. Port Jackson, etc., Co., 17 Barb. 397.

3 This is a salutary rule against allowing directors to diminish the capital by purchase of shares or otherwise, and the necessity of enforcing it as a safeguard not only to the beneficiaries of the corporate fund but of the public was ably demonstrated by the justice delivering the opinion in Percy v. Millaudin, 3 La. 270, 585; O. S. 2 La. (N. S.) 364, 375.

est. But, in case of an outright purchase by a company with its capital, the funds so used would be chargeable with a trust in favor of the creditors in case of insolvency, the same as other capital withdrawn.

§ **169. Cases holding a contrary view.**—The cases supporting a contrary doctrine proceed upon the theory that after a purchase the stock is substituted as assets in the place of the price paid for them, and hence there is no actual reduction of capital or assets. But a consideration of the real nature of a stock subscription and of the resulting rights and obligations, and a comprehension of the character and consequences of a purchase by a corporation of shares in itself discloses the error of this view. If the corporation may purchase for a fair price, it may purchase for a nominal price; and if it may purchase the shares of a part, it may those of all the shareholders; and thus by an easy process cause the entire capital to disappear, leaving neither assets nor shareholders to answer the claims of creditors.[1]

§ **170. Exceptions to the rule.**—A corporation may, under some circumstances, purchase its own shares where

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[1] The principal cases in which it has been held that purchases and cancellations could be made by corporations are: Chetlain v. Republic L. Ins. Co., 86 Ill. 220; City B'k v. Bruce, 17 N. Y. 507; Chicago, etc. R. R. Co., v. Marseilles, 84 Ill. 643; Iowa Lumber Co. v. Foster, 49 Ia. 25. In a late case, First Nat. B'k v. Salem Flouring Mill Co., 39 Fed. Rep. 86, 96 (1889), Deady, U. S. Cir. J. Dist. Or., said:—"The rule appears to be well settled that a corporation may, unless prohibited by statute, purchase its own stock or take it in pledge or mortgage;" citing Bank v. Bruce, supra; Taylor v. Exporting Co., 6 Ohio, 176; In re Ins Co., 3 Biss. 452; Bank v. Transportation Co., 18 Vt. 138; Dupee v. Water-power Co., 114 Mass. 37; Clapp v. Peterson, 104 Ill. 26. In the last case cited, the assertion of the rule was with the qualification "that such act is had in entire good faith, is an exchange of equal value and is free from all fraud actual or constructive; thus implying that the corporation is neither insolvent nor in process of dissolution."

the transaction is conducted in good faith, and clearly subserves the best interests of the remaining shareholders. For instance, where there is a *bona fide* dispute concerning the liability as a shareholder of a person to whom shares have been issued, to save the expense of litigation, they may be accepted and cancelled as part of the terms of settlement.[1]

Shares may on the same principle be accepted by the directors on behalf of the corporation as a gift or bequest[2]

It is easily seen that these cases are rather within the principle of the rule than exceptions to it. By allowing such transactions to stand, the assets are increased rather than diminished, and there is not an actual diminution of capital.

The purchase of stock in corporations by themselves is in some states permitted, and in others prohibited by statute. Permission given to a private corporation to buy stock in others, however extensive the authority, does not render it in any sense a public corporation.[3] In most states, however, corporations are allowed to purchase and hold, subject to the control and disposal of the remaining shareholders, shares sold for delinquent assessments, where there are no bids by other parties of the amount due.

§ **171. Further considered.**—Where it is doubtful whether a transfer by a stockholder to the corporation

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[1] Lord Belhaven's Case, 3 De G. J. & S. 41; New Albany v. Burke, 11 Wall. 96; State v Oberlin Bldg. Ass'n, 35 O. St. 258.

[2] Rivanna Nav. Co. v. Dawsons, 3 Gratt. 19. It has been frequently held that a corporation may accept its shares at par or at an agreed price in satisfaction of debts due it, which cannot be otherwise collected and would be lost to it. Williams v. Savage Mfg. Co., 3 Md. Ch. 418; Cooper v. Frederick, 9 Ala. 738; State B'k v. Fox, 3 Blatchf. 431; Taylor v. Miami Expr. Co., 6 Ohio, 177.

[3] Wolfe v. Underwood (Ala.), 8 So. 774.

is a cancellation or a sale, the courts incline to construe it to be a sale, as in that case the stock is not merged or extinguished and the stockholder may be held liable thereon to creditors on winding up.[1] Prohibitory statutes have been passed on the subject in several states and by Congress with respect to corporations created under the national banking act. Though these may be considered merely as legislative declarations of the common law, yet they have the beneficial effect of removing any uncertainty occasioned by the conflict of judicial *dicta.*[2]

The national banks may take stock in payment of debts, but must re-sell within six months; and they may sell on credit retaining the stock as collateral.[3]

In case of violation of this provision the debtor cannot take advantage of it as a defense.[4] Stock so taken is not merged, nor is the capital stock thereby re-

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[1] Halls' Case, L. R., 5C h. 707; Teasdale's Case, L. R., 9 Ch. 54; Thomas' Case L. R., 13 Eq. 437.

[2] Nat. Banks are prohibited from dealing in stock by R. S. Sec. 5201. See Bank v. Lanier, 11 Wall. 369. But if a stockholder sells to one who purchases for the bank, he is no further liable thereon if at the time of the sale he had no knowledge or notice that the purchase was being made for the bank. Johnson v. Laflin, 103 U. S. 800. But in such case the person so purchasing becomes personally liable as a stockholder. Bundy v. Jackson, 24 F. 628.

By New York 1 R. S. Ch. 18, Tit. 2, Art. 1, Sec. 1 (7th Ed.), money corporations, and by act of 1850, Sess. Laws Ch. 140, Sec. 8, p. 1547, 7th Ed. R. S., railroad corporations are prohibited from dealing in either their own or the stock of other corporations. By Laws 1881, Ch. 468, Sec. 12, an exception is made in favor of certain railroad corporations which may provide otherwise in their articles of incorporation. For construction of the N. Y. Statutes, see U. S. Trust Co. v. U. S. Fire Ins. Co., 18 N. Y. 199, 226; Gillett v. Moody, 3 N. Y. 479, 487; Tracy v. Talmage, 14 N. Y. 162; Barton v. Railroad Co., 17 Barb. 397.

[3] Un. Nat. B'k v. Hunt, 76 Mo. 439.

[4] Shoemaker v. Nat. Mechanics' B'k, 31 Md. 396; Stewart v. Nat. Un. B'k, 2 Abb. (U. S.), 424; Nat. Bank of Xenia v. Stewart, 107 U. S. 676; Gold Mining Co. v. Nat. B'k, 96 U. S. 640; O'Hare v. Second, Nat. B'k, 77 Penn. St. 96.

duced;[1] and the managing agents may at any time sell the same at its market value and need not hold it at its par value like an original issue.[2]

§ 172. **Dealings in shares of other corporations.**—A private corporation has no implied authority to invest in the shares of another private corporation. If this were not so, it might, by an easy process, transfer all its resources to another and not only deprive its creditors of all remedy but escape responsibility for duties which it owes the state. Especially does the rule, as well as the reason, upon which it is based, apply to railroad corporations.[3] The same view obtains in England. Such a transaction is there looked upon as "an attempt to carry into effect without the interven-

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1 Vail v. Hamilton, 85 N. Y. 453; Williams v. Savage Mfg. Co., 3 Md. Ch. 418, 451; State B'k of Ohio v. Fox, 3 Blatchf. 431; State v. Smith, 48 Vt. 266; American Ry. Frog Co. v. Haven, 101 Mass. 298; Ex parte Holmes, 5 Cow. 226.

2 State Bank of Ohio v. Fox, 3 Blatchf. 431; State v. Smith, 48 Vt. 266.

3 Cent. R. R. Co. v. Collins, 40 Ga. 582; Mut. Sav. B'k & Bldg. Ass'n v. Agency Co., 24 Conn. 159; State v. Butler (Tenn.), 8 S. W. Rep. 586; Re Liquidators of the British Nation Life Assur. Ass'n, L. R., 8 Ch. Div. 679; Pierson v. McCurdy, 33 Hun, 531; Berry v. Yates, 24 Barb. 199; Joint-stock Disct. Co. v. Brown, L. R., 8 Eq. 381; Summer v. Marcy, 3 W. & M. 105; New Orleans F. & H. S. Co. v. Ocean Dry Dock Co., 28 La. Ann. 173. "If one railroad company may, at its option, buy the stock of another, it practically undertakes a new enterprise not contemplated by its charter," Hazlehurst v. Savannah, etc., R. R. Co., 43 Ga. 13, 57. See also Elkins v. Camden, etc., R. Co., 36 N. J. Eq. 5, sustaining at the suit of a stockholder to prevent a purchase about to be made with a view to extinguishing competition. Cent. R. R. Co. v. Penn. R. R. Co., 31 N. J. Eq. 475; Pearson v. Concord R. R. Co., 62 N. H. 537; Mackintosh v. Flint, etc., R. R. Co., 34 Fed. Rep. 582; Gt. Western Ry. Co. v. Metropol. Ry. Co., 32 L. J. (Ch.), 332; Millbank v. N. Y., etc., 64 How. Pr. 20; Woods v. Memphis, etc., R. R. Co., 5 Ry. & Corp. L. J. 372 (Ala.). It does not alter the case that the purchase is attempted through and in the name of a corporation owning a leased line of the purchasing company. Southwestern R. Co. v. Papot, 67 Ga. 675. See County Ct. v. Balt., etc., R. R. Co., 35 F. 161, holding that a railroad company may take the stock and bonds of another as collateral security for advances.

tion of Parliament, what cannot lawfully be done except by Parliament."[1] But a company having power to consolidate with another, may purchase its stock.[2]

The disability does not extend to the stockholders. One who is the principal stockholder in one railroad company may purchase a controlling interest in another.[3] And frequently, the power to purchase stock in other companies is conferred upon railroad companies by statute or in their charters.[4]

The rule does not extend beyond the reason of public policy upon which it is based. Hence, it is held that religious and charitable corporations and corporations formed for literary purposes have, by necessary implication, for the better preservation and productiveness of the funds with which such institutions are endowed, the power to invest such funds in the stock of other corporations.[5]

§ **173. Receiving stock as collateral security.**—Since a transfer in pledge may, in the end amount to a sale, there is at common law the same disability to take stock as collateral security as to purchase it outright.[6] But a relaxation based upon well established usage exists in the case of banking corporations. The

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1 Gt. Northern R. Co. v. Eastern Counties R. Co., 21 L. J. Ch. 837. See also Solomon v. Laing, 12 Beav. 389, where it was held immaterial that the stock was purchased for the purpose of obtaining an injunction; Maunsell v. Midland, etc., R. Co., 1 H. & M. 130.

2 Hill v. Nisbit, 100 Ind. 341.

3 Havemeyer v. Havemeyer, 43 Sup. Ct. (N. Y.), 506, affd. 86 N.Y. 618; Matthews v. Murchison, 15 Fed. Rep. 691. See White v. Syracuse & Utica, R. R. Co., 14 Barb. 559; Matthews v. Murchison, 17 Fed. Rep. 760; Zabriskie v. Cleveland, etc., R. R. Co., 23 How. 381; Ryan v. Leavenworth, etc., Ry. Co., 21 Kan. 365; Mayor v. Balt. & O. R. R. Co., 21 Md. 50; Atchison, etc., R. R. Co. v. Fletcher, 35 Kan. 236; 10 Pac. Rep. 596.

4 See Hodges v. N. E. Screw Co., 1 R. I. 312.

5 Tracy v. Talmage, 14 N. Y. 162; First Nat. B'k v. Nat. Exch. B'k, 92 U. S.

validity of pledges of stock to banks, to secure contemporaneous loans has been declared in numerous cases.[1]

122, 128; Royal Bank of India's Case, L. R., 4 Ch. 252; Nassau B'k v. Jones, 95 N. Y. 115, 120; Franklin Co. v. Lewiston Institution for Savings, 68 Me. 43.

[1] See Sistare v. Best, 88 N. Y. 527; Royal Bank of India's Case L. R., 4 Ch. 252; Shoemaker v. Nat., etc., B'k, 1 Hughes, 101; Nat. Bank v. Case, 99 U. S. 628.

CHAPTER IX.

EXERCISE OF POWER THROUGH AGENTS.

§ 174. **The general law of agency applicable.**—A corporation being merely an ideal entity can no more act without the intervention of agents than a partnership without partners, or a public office without an officer. Even when an act is done by a majority of the members assembled at a corporate meeting, their authority depends upon an implied agency from the dissenting minority and the absentees.

This absolute dependence gives the general law of agency peculiar importance when applied to the dealings of corporations. We measure a corporation's right to employ and act through agents by the full extent of its powers. We answer the question, "What can it do through agents?" by asking "What has the corporation itself authority of law to do?" To corporations applies with great fitness the maxim "*qui facit per alium facit per se.*

§ **175. Limitations on authority of agents.**—A corporation may, and usually does, confer most of its power upon a board of managing agents, to be exercised by them as a body and through various subordinates appointed by them. But there is always a reservation of ultimate authority or *jus disponendi* of corporate power reserved in the members at large which must be called forth in the last emergency.[1] An illustration is seen in the process of voluntary dissolution and sale of the corporate property with a view to abandoning the corporate enterprise.

§ **176. Collective power of members.**—The membership, collectively expressing its will through its majority, is

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1 Bocock's Extrs. v. Alleghany C. & I. Co., 82 Va. 913; 1 S. E. 325. See Stevenson v. Polk, 71 Ia. 278; 32 N. W. 340, where a limitation as to instruments affecting real estate held not applicable to release of a mortgage. French Spiral Spring Co. v. N. E. Car Trust, 32 F. 44, holding that similar limitation upon contracts involving liability to pay money does not apply to acceptance of order in liquidation of previous indebtedness. A vote by a meeting of stockholders of a corporation to purchase all the materials, tools, and personal property of another certain corporation, giving in payment therefor a certain sum in capital stock of the first corporation, to be issued to a designated person as trustee, and to pay a certain royalty, authorizing the issuance of the stock to the trustee, and providing that any balance left after paying the liabilities of the second corporation should be issued to the treasurer of the first, does not authorize a contract to pay all of the second corporation's debts absolutely, in consideration for a transfer of its property. Bi-Spool S. M. Co. v. Acme Manuf'g Co., (Mass.) 26 N. E. 991.

both the first and the last actor, superior to all others, and the source whence all agents derive their authority.

When by statute or constating instruments the control of the corporation's affairs is given to its board of directors, the investiture of power is understood to be subject to a reservation of final authority in the membership who collectively constitute the only agent possessing all the powers of the corporation. It is too evident to need illustration that no agent, great or small, can do any act in excess of the powers conferred by the charter upon his principal and such as are incidental thereto.

In order, therefore, to determine the legal effect of an act done, ostensibly by a corporation through an agent acting on its behalf, it is necessary to keep in view not only the law of agency as applied alike to artificial and natural persons, but also the extent of powers conferred by the charter or articles and the limitations imposed by statute and the qualifications contained in the by-laws.[1]

§ 177. Authority of agents derived solely from powers of corporation.—It is a rule well settled and recognized in nearly every decision on questions involving the acts of agents that corporations are not, as a general rule, bound by the acts of agents done in excess of their authority. The important interests often intrusted to corporate agents and the opportunities thus afforded for abuse of their trust, with consequent loss to mem-

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[1] Rathburn v. Snow, 3 N. Y. S. 925, no liability incurred for supplies contrary to provisions of a by-law. See also People v. N. R. Sugar Ref. Co., 25 Abb. N. C. 1; Stutz v. Handley, 41 Fed. R. 511; Star Pr. Co. v. Andrews, 9 N. Y. S. 731; Duke v. Markham, 105 N. C. 131; 10 S. E. 1017, consent to corporate act given elsewhere than in corporate meeting not binding; The Lyceum v. Ellis, 57 N. Y. Sup. Ct. 532, holding that under N. Y. Stat. consent of holders of two thirds of stock actually issued is sufficient to authorize mortgage of corporate property.

bers, make it necessary that courts should hold agents and not the corporation to account for acts done in excess of authority. Justice to shareholders requires that they shall not suffer loss through the unauthorized acts of agents from whom they are generally widely separated. To these general rules there are, however, important exceptions, founded upon reasons of justice. The exceptions are made in cases which appeal so strongly to the sense of right as to supersede and overcome the reasons for the rule itself. One important exception is where a principal employs an agent in a particular transaction and clothes him with apparent authority in that transaction or course of business. A person who, in that case, deals with the agent, within the scope of his apparent authority, will bind the corporation. The recognition of this exception is essential to the safety of persons dealing with agents regardless of the nature and character of their principals. It has been held to act upon the principal as an estoppel.[2] But his liability would seem more properly to arise from an implied obligation.

§ **178. When authority may be presumed.**—For, when an agent is employed to transact business of a particular kind or is put in charge of a department of a corporation's business, he may be presumed by all dealing

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[1] Wilson v. Kings Co. R. R. Co., 114 N. Y. 487; 21 N. E. 1015. Merrill v. Consumers' Coal Co., Id. 216, where a practice by the president of paying attorneys for legal services in stock of the corporation was held to be admissible in evidence to bind the corporation in the case before the court; St. L. & C. R. R. Co. v. Drennan, 26 Ill. App. 263, course of dealing by member of executive committee. The directors of the association being by its by-laws empowered to manage its affairs, the corporation cannot defeat the recovery of money borrowed by direction of the directors, on the ground that the directors applied the money to an unauthorized purpose, unless the lender knew that such purpose was unauthorized. North Hudson Mut. Bldg. & Loan Ass'n v. First Nat. Bank (Wis.), 47 N. W. 300.

[2] New York, etc., R. L. Co. v. Schuyler, 34 N. Y. 30, 73.

with his principal through him to possess authority to exercise all the powers and to resort to all the means usually incident to such authority, or pertaining to that department or class of business.

And though he do acts prohibited by the terms of his employment, those who deal with him within the scope of apparent authority are not bound to investigate the original intention of the parties. The implication from the course of dealing and the appearance held out may in such case be accepted as real and materially affecting the result whether the corporation is estopped or bound by an implied obligation. The question as to what facts and circumstances will warrant a presumption of authority in the absence of positive proof is a broad one, peculiarly appropriate for a jury.[1]

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[1] Where C. had been accustomed to collect the moneys and pay the bills of plaintiff without objection, it was held that plaintiff's officers were estopped to deny C.'s authority to make such collections. Craig Medicine Co. v. Merchants' Bank, 14 N. Y. S. 16. The evidence was deemed sufficient to support the finding that authority had been given in the following cases: Jansen v. Glass Letter Co., 1 N. Y. S. 605; Whittaker v. Kilroy, 70 Mich. 635; McNeil v. Boston Chamber of Commerce (Mass.), 28 N. E. 245 (Sept. 1, 1891), involving implied powers of a committee; Bank of Attica M'fg. Co., 1 N. Y. S. 483; South Covington & C. B. Ry. Co. v. Best, 34 F. 628; Borland v. Haven, 37 F. 394; Siemens R. G. L. Co. v. Horstman (Pa.), 16 A. 490; Griffith v. Chicago P. R. Co., 74 Ia. 85; East R. T. Co. v. Brower, 80 Ga. 258; 7 S. E. 273; Deller v. Staten Is., etc., Club, 56 Hun. 647; 9 N. Y. S. 876; Sims v. Davidson, 54 N. Y. Sup. Ct. 235; Panhandle Nat. Bank v. Emory (Tex.), 15 S. W. 23; Sherman, etc., Co. v. Stevens, 13 Colo. 534; Huntington v. Attrill, 118 N. Y. 365; 23 N. E. 544; Hardin v. Constr. Co., 78 Ia. 726; 43 N. W. 543; Corcoran v. Snow Cattle Co., 151 Mass. 74; 23 N. E. 727; Nat. B'k v. Navassa P. Co., 56 Hun, 136; 8 N. Y. S. 929; Wilson v. Met. Ry. Co., 120 N. Y. 145; 24 N. E. 384; McDonald v. Chisholm, 131 Ill. 273; 23 N. E. 596; Manhattan Hardware Co., v. Phalen, 128; Pa. St. 110; 18 A. 428; Davies v. New York Concert Co., 13 N. Y. S. 739; Wilson v. K. C. El. Ry. Co., 114 N. Y. 487; Eureka I. W. v. Bresnahan, 60 Mich. 332; 27 N. W. 524; Merrill v. Coal Co., 114 N. Y. 216; G. C. & S. F. Ry. Co. v. James, 73 Tex. 12; 10 S. W. 744; St. L., etc., Co. v. Drennan, 26 Ill. App. 263; Walker v. Wilmington C. & A. R. Co., 26 S. C. 80; Fifth Ward Sav. B'k v. First Nat. Bank, 47 N. J. L. 357.

The fact that a Presbyterian clergyman, recognized as such, claimed to hold certain specific property in Santa Fe., for a religious corporation in New York; that said corporation could not, on account of its distance, occupy its lands except by means of servants, agents, tenants, or other representatives; the state-

§ 179. **To indorse commercial paper.**—An illustration of this principle is found in the case of cashiers of banks who have general authority to issue and indorse negotiable paper and to certify checks in carrying on the business of the bank. A person who, in good faith and without notice, receives any commercial paper ordinarily dealt in by banks of that character, indorsed or certified by the cashier may hold the corporation liable although no express authority for the act can be found in its charter or by-laws.[1] But it cannot be presumed that the agent of a corporation has authority to transact business which the corporation is not author-

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ments of such clergyman, and his position in Santa Fe., raise a strong presumption that he was acting for the plaintiff corporation, and that his possession was the possession of the corporation. Probst v. Trustees, etc., 3 N. M. 237; 5 P. 702.

Where the directors of a steam packet company authorize arrangements to be made with persons "to induce them to buy freight for the boats," it is within the power of the president to guarantee shippers against loss upon the merchandise to the extent of the freight charges. Ward v. Davidson, 89 Mo. 445.

A different conclusion was reached in Little v. Kerr, 44 N. J. Eq. 263; 14 A. 613; Mer. Nat. B'k v. Detroit K. & C. W., 68 Mich. 620; 36 N. W. 696; Getty v. Milling Co., 40 Kan. 281; 19 P. 617; Stanley v. Sheffield L. I., etc., Co., 83 Ala. 260; 4 So. 34; McElroy v. Nucleus Ass'n, 131 Pa. St. 393; 18 A. 1063; Duke v. Markham, 105 N. C. 131; 10 S. E. 1003; Bohm v. Brewery Co., 30 St. R. 424; 9 N. Y. S. 514; First Nat. Bank v. C. B. C. W. W. Co., 56 Hun, 412; Wahlig v. Mfg. Co., 9 N. Y. S. 739; Alta S. M. Co. v. Alta P. M. Co., 78 Cal. 629; 21 P. 373, and the evidence held insufficient to warrant finding the corporations liable.

Where a special agent and adjuster of an insurance company, pending negotiations after loss, confers with assured and her attorney concerning the proofs thereof, and employs an attorney to assist in the investigation of the loss, and seeks to secure a cancellation of her claim on the repayment of the premium, and, without informing her of the existence of any limitation on his authority to bind his principal, positively refuses to pay the claim, the company will be estopped to deny the agent's authority to bind it. California Ins. Co. v. Gracey (Colo.), 24 P. 577.

But a soliciting agent of an insurance company has no authority to waive a breach of the condition relative to additional insurance, or to estop the company by admissions after loss. Phœnix Ins Co. v. Copeland (Ala.), 8 So. 48.

[1] Bank of Genessee v. Patchin B'k, 13 N. Y. 309; 19 N. Y. 312; City Bank v. Perkins, 29 N. Y. 554; Meade v. Merchants' Bank, 25 N. Y. 143; Cooke v. State Nat. Bank, 52 N. Y. 96; Merchants' Bank v. State Bank, 10 Wall. 604; Faneuil Hall B'k v. Bank of Brighton, 16 Gray, 534; Everett v. United States, 6 Port. 166. Compare Mussey v. Eagle Bank, 9 Metc. (Mass.) 306.

ized by its charter to engage in.[1] Therefore, no authority to indorse commercial paper for the accommodation of the maker will be presumed; and the charter containing the grant of powers, being matter of public record, all dealing with the agents of the corporation are presumed to take notice that no such power has been conferred upon the corporation itself.[2] A corporation has no power to indorse on its behalf, or in its name a third party's note for accommodation.[3]

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[1] Nat. Park B'k v. German Warehousing Co., 116 N. Y. 281; 5 L. R. An. 673; Alexander v. Cauldwell, 83 N. Y. 480; Dabney v. Stevens, 2 Sweeney, 415. See Chicago & N. W. R. R. Co. v. James, 22 Wis. 194; Bank of Battle Creek v. Mallan (Minn.), 34 N. W. 901; Farmers' Loan & Trust Co. v. Carrall, 5 Barb. 613, 649; Farmers' etc., T. Bank v. Harrison, 57 Mo. 503; Blen v. Bear River & A. W. & M. Co., 20 Cal. 602; Barnes v. Pennell, 2 H. L. Cas. 520.

[2] Leavitt v. Yates, 4 Edw. Ch. 174; Adriance v. Roome, 52 Barb. 399; Lowell F. C. Sav. Bank v. Winchester, 8 Allen 109; Zabrinskie v. Cleveland C. & C. R. Co., 23 How. 398; Pearce v. Mad., etc., R. Co., 21 How. 443; Salem B'k v. Gloucester B'k, 17 Mass. 1; The Floyd Acceptances, 7 Wall. 676; U. S. v. City Bank, 21 How. 364.

But under the circumstances in Allen v. First Nat. Bank, 127 Pa. St. 51; 17 A. 886, the corporation was held bound by an accommodation indorsement made by its cashier.

[3] Bank v. German Warehousing Co., 116 N. Y. 281; Coulter v. Richmond, 59 N. Y. 478; Cawley v. Castello, 15 Hun, 303; Cromwell v. Hewitt, 40 N. Y. 491 and note; Farmers' & M. Bank v. Empire Stone Dr. Co., 5 Bosw. 275; Morford v. Farmers' Bank, 23 Barb. 568; Cent. B'k v. Empire Stone Dr. Co., 26 Barb. 23; Bank of Genessee v. Patchin B'k, 13 N. Y. 309; Culver v. Reno R. E. Co., 91 Pa. St. 367; Hall v. Auburn Tp. Co., 27 Cal. 255; Walker v. Wilmington C. & A. R. Co., 26 S. C. 80; 1 S. E. 366; Bank v. Bank, 48 N. J. L. 513; 7 A. 318; or to execute a note as surety for another; Hall v. Auburn Turnp. Co., 27 Cal. 255; Smead v. Indianapolis P. etc., R. Co., 11 Ind. 204; Laverty v. Burr, 1 Wend. 529. The case is not altered by the fact that the accommodation indorser is a stockholder. Webster v. Howe Mach. Co., 54 Conn. 394; 8 A. 482. But where a corporation has general power to issue negotiable securities a *bona fide* holder without notice that the paper was indorsed for accommodation has a right to presume that it was issued under circumstances which gave the agents the requisite authority even though neither the corporation nor its agents in the transaction was actually vested with power and authority. Mechanics' Banking Ass'n v. N. Y. & S. White Lead Co., 23 How. Pr. 74, 79; Affd. 35 N. Y. 505; Bank v. Hall, 44 N. Y. 395; Bissell v. Mich. So. & N. I. R. Co., 22 N. Y. 289; Booth v. Farmers' & M. Nat. B'k, 4 Lans. 306; 50 N. Y. 400; Weeks v. Fox, 3 Thomp., etc., 355; Lexington v. Butler, 14 Wall. 296; Merch. Nat. Bank v. State Nat. B'k, 10 Wall. 644. See Barnes v. Ontario Bank, 19 N. Y. 164; Safford v. Wyckoff, 4 Hill 445; Willmarth v. Crawford, 10 Wend. 344.

§ 180. Matters within exclusive cognizance of agents.— Another case requiring an application of the principle of the exception is where the authority of the agent is conditional upon the existence of certain facts peculiarly within his knowledge or not equally open to the knowledge of others, though mentioned in the corporation's charter or by-laws.

Under these circumstances, a party dealing with such agent is entitled to assume the facts upon the existence of which his authority depends. In case such authority depends for its continuance upon the non-occurrence of certain events, a party acting in good faith and without notice may safely assume that the events designed to operate as a defeasance of the agents' authority have not transpired. This exception rests upon the same reasons of public convenience and safety as the one previously noticed.

Where the agent is an officer his authority is limited in point of time to the term for which he was elected or appointed. If appointed for a special purpose, his authority ceases upon the accomplishment of that purpose. By the very terms of his employment, his term of service may be limited, or he may be subject to discharge at any time.

By whatever means his agency may be terminated if, after it has ceased, he continues to act and the corporation continues to recognize his acts as an agent, it would, on this principle, be held liable for acts done in its name and within the scope of the original authority.[1]

Under denial by corporation that it made the indorsement, it may show that though made by its treasurer, it was never authorized by its directors. Wahlig v. Mfg. Co., 9 N. Y. S. 739. Generally, authority must be proven by the party claiming title under it. Bank v. Hirsch Bws., etc., Co., 4 N. Y. S. 385; Sheridan Electric L. Co. v. Bank, 52 Hun, 575.

[1] Northern Cent. R. Co. v. Bastian, 15 Md. 494. See also Clark v. Pratt, 47 Me. 55; Ang. & Am. on Corp. Sec. 283.

§ 181. Duty of corporation upon the termination of agent's authority.—Where the authority of an agent has been withdrawn, a neglect to notify parties who have dealt with him as such estops the corporation from denying his authority, where doing so would result in loss to such parties, on the same principle that neglect of a retiring partner to notify the firm's customers of his withdrawal would render him liable in future transactions in which credit was given to the firm on the strength of his supposed connection. In these cases the omission of the act which would have prevented the injury shuts out the truth, to wit:—the actual want of authority.[1] Although an election or appointment of an agent or officer be irregular for want of compliance with prescribed formalities, yet, if such appointment or election be subsequently ratified by the corporation a regular appointment or election may be presumed.[2] And although acting officers be ineligible their acts while allowed by the proprietors to take control of its property and exercise its functions bind it.[3]

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[1] N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30. But it seems that no presumption in favor of continuing authority will prevail where the term for which an officer of a corporation was appointed has expired and he continues to act in the absence of some recognition by the corporation. See N. Y. P. & N. Ry. Co. v. Bates (Md.), 11 A. 705.

[2] Browning v. Gt. Cent. Min. Co., 5 H. & N. 856; Smith v. Hull Glass Co., 11 C. B. 897; Sampson v. Bowdoinham Mill Co., 36 Me. 78; Penobscot, etc., R. Co. v. Dunn, 39 Me. 587; Smith v. State B'k, 18 Ind. 327; Goodwin v. Un. Screw Co., 34 N. H. 378; Ohio, etc., R. Co. v. McPherson, 35 Mo. 13; Waite v. Windham Min. Co., 36 Vt. 18; Charitable Ass'n v. Baldwin, 1 Met. 359; Allen v. Cit. Steam Nav. Co., 22 Cal. 28; Southgate v. Atlantic, etc., R. Co., 61 Me. 89; State B'k v. Chetwood, 3 Halst. (N. J. L.) 1; Mich. Nat. Bank v. Burnett, 32 N. J. Eq. 236; Minor v. Mech. B'k, 1 Pet. 96; Union Bank v. Call, 5 Fla. 409; Elwell v. Dodge, 33 Barb. 336; Vernon Soc. v. Hills, 6 Cow. 23; Beers v. Phœnix Glass Co., 14 Barb. 358; Farmers' Mut. Ins. Co. v. Taylor, 73 Pa. St. 342.

[3] Mech. Nat. Bank v. Burnett Mfg. Co., 32 N. J. Eq. 236. See also Atlas Nat. B'k v. Gardner, 8 Biss. 537; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; Delaware, etc., Canal Co. v. Penn. Coal Co., 21 Pa. St. 131; Thorington v. Gould, 59 Ala. 461. But in Ellsworth Mfg. Co. v. Farmer, 79 Me. 440; 10 A. 250, it was held that a board of directors claiming an election at a meeting at

§ **182. Conditional authority of directors.**—Where directors have authority to do an act, to borrow money for instance, provided a resolution authorizing it should be previously adopted at a general meeting, a party loaning them money in good faith and without information has a right to assume that a proper resolution has been passed.[1]

§ **183. How scope of authority determined.**—Prevailing custom and usage have long since led the business public to attach certain duties to different corporate officers. Unless they have information to the contrary, or the constating instruments of which they are bound to take notice contain provisions to the contrary, persons dealing with the corporation through agents are justified in presuming that particular officers possess authority to perform the usual duties pertaining to such offices. This may be stated as the broadest rule on the subject under consideration, and contains not only the rule of actual and incidental authorization, but also its exceptions.

The instances are numerous, in which authority from

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which less than the number of votes required by the by-laws for the purpose of electing were cast, could not be regarded as officers *de facto* as against another board holding over from a previous election about which there was no dispute.

[1] Mining Co. v. Anglo California Bank, 104 U. S. 192; Affg. 5 Saw. 255. See also Lee v. Pittsburgh Coal Co., 56 How. Pr. 376; Phillips v. Campbell, 43 N. Y. 271.

A corporation organized under section 2, c. 37, Laws N. Y. 1848, could not, under that act, mortgage its property. Under chapter 480, Laws 1867, it could do so with the consent of two-thirds of its stockholders, Section 2, c. 374, Laws 1872, authorized such a corporation to give a mortgage to secure the payment of money borrowed to carry on its business. *Held* that, by the last act, the consent of the stockholders was dispensed with. Davidson v. Westchester Gas light Co., 99 N. Y. 558; 2 N. E. 892.

Where the consent, however, does not embrace the right to mortgage the franchises, rights, and liberties, power to do which is conferred by chapter 163, Laws 1878, and requires the consent of stockholders, a mortgage given is inoperative as to the franchises. Lord v. Yonkers Fuel Gas Co., 99 N. Y. 547; 2 N. E. 909.

corporations to agents to do acts and make contracts in the absence of actual authority has been implied. The test of the extent to which an agent placed in charge of a particular business may bind his principal is whether those who dealt with him and relied upon his authority had a right to do so in view of the appearances his principal had enabled him to present to the public.[1]

A just and safe rule is deducible from a recent New York decision. It is to the effect that a mere practice of doing a certain act in a certain way, in the name of the corporation, by a particular agent having neither

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[1] Perkins v. Washington Ice Co., 4 Conn. 645. Where the secretary of an insurance company had for a long time habitually and without objection by the managing board indorsed assignments of policies and made entries of the same in the books, the corporation was held estopped from setting up a provision in the by-laws to the effect that such assignment could be made only by the consent of the directors themselves. The regular entries in the books of the corporation were deemed sufficient to charge the directors with notice of the exercise of the authority in question by the secretary. Conover v. Mut. Ins. Co., 1 N. Y. (1 Comst.) 290. A by-law of a manufacturing company provided that no officer or agent should contract indebtedness on behalf of the corporation exceeding twenty-five dollars without consent of the board of directors. The president had purchased of plaintiff for a price exceeding the limit articles which were used by the corporation. In the absence of proof that plaintiff had a notice of such by-law it was held liable. Ten Brock v. Boiler, etc., Co., 20 Mo. App. 19. Where a clerk of a corporation had been in the habit of borrowing money and executing its notes therefor with the knowledge and acquiescence of its board of directors and the note in question was for money borrowed by him and used in its business; these facts were decided to be proper evidence that his act was that of the corporation to go to the jury. Mead v. Keeler, 24 Barb. 20. The general manager of a trading corporation was in the habit of assisting persons with whom the corporation dealt. The corporation was held liable on a note which he had indorsed in the name of the company; and procured to be discounted for the maker's benefit. Holmes v. Willard, 53 Hun, 629; 5 N. Y. Supp. 610. The court said:—"Trading corporations are necessarily managed in a more informal way than those of a different character. They are voluntary copartnerships having a right of survivorship not dissolved by reason of the death of any one of the parties in interest, and a director or officer or manager with whom is intrusted all the business of the corporation can exercise all the powers which the board of directors could exercise," etc. Citing Hoyt v. Thompson, 19 N. Y. 209. A guaranty executed by officers of a corporation based upon a contract which they have not authority to make is without consideration and not binding upon the corporation. Granger v. Bourn, 7 P. 760.

actual nor apparent authority, however often the act may be repeated, will not be sufficient to estop the corporation from denying his authority, unless its managers be chargeable with either actual or constructive notice, as for instance, entering the transactions upon the books of the corporation.[1] And a corporation is not bound to make good losses resulting from dealings with its agents where the person advancing money or performing services has notice that the agent has a personal interest in the matter, distinct from his principal, although the agent's general authority in the transaction is undoubted.[2]

§ **184. The true measure of authority.**—The scope of an agent's authority, considered aside from the presump-

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[1] Nat. Bank of Republic v. Navassa Phosphate Co., 56 Hun, 136; (N. Y.) 7 Ry. & Corp. L. J., 372. The president of the company was shown to have indorsed from 300 to 400 notes in its name and an action had been brought upon one of these notes. The court said, per Cullen J.: "If for several years Lawton (the agent) though without authority was using the credit of the company and the corporate machinery to avail himself of that credit, entering the transactions on the books of the corporation and paying obligations out of apparently corporate funds, we think the trustees could not by their negligence in omitting to discover the fact, of practically turning over to Lawton the whole management of the New York office, relieve the company from liability to those who had acted on the faith of the apparent power. But the indorsement of numerous notes was not of itself sufficient to charge the company. Such was a mere repetition of the fraud. The essential point was to charge the defendant with either actual or implied notice." See also R. R. Co. v. Sawyer, 54 N. Y. 30; Compare Sparks v. Despatch, etc., Co. (Me.), 15 S. W. 417. Proof that one is an agent of a corporation or a particular officer, without proof that he has authority either apparent or real to transact the business out of which the alleged liability arose will not be sufficient. Bank v. St. Anthony's Church, 109 N. Y. 512; McCulloch v. Miss., 5 Denio 567; Bridge Co. v. Bachman, 66 N. Y. 262.

[2] Where plaintiff was employed by the president of a railroad company to procure some person to build the road on terms profitatble to the president and to himself it was held that he could not recover from the railroad company for his services in obtaining the contract; and it was held to make no difference whether the directors of the company knew of and approved the contract or not. The company was not bound by it and could repudiate it as a diversion of profits. See also, Lyndon Mill Co. v. Lyndon, etc., Inst. (Vt.), 22 A. 575; Hill v. Pub. Co. (Mass.) 28 N. E. 142. Van Valkenburg v. Thomasville T. & G. R. Co., 52 Hun, 610.

tions in which outside parties for salutary reasons are sometimes permitted to indulge, is determined to a great extent by the nature of the employment.

Of course it is within the power of the parties to insert minute details and specific limitations and definitions in a contract of employment or in the by-laws imposing duties upon officers ; but that is seldom done and is virtually impracticable. Whatever the character of the agent, the ultimate source of authority is the constating instruments.[1]

§ **185. Scope of authority of directors.**—Directors are agents whose agency is coupled with an important trust, to be executed in a manner differing in many respects from the methods adopted by other agents. Their relations to the corporation, to those dealing with it, to other agents and to the members are sufficiently important and peculiar to justify a separate division devoted to that subject and need be noticed here only incidentally.[2]

§ **186. Where directors are given control.**—Although several states have provided that the corporate powers, business and property of all corporations " must " be exercised and controlled by a board of directors, yet the directors derive their appointment from the members at large, who also have authority to regulate the conduct and limit the authority of the board of directors in a code of by-laws. They retain the further right to call the board to account by various actions at law and in equity to be hereinafter set forth.[3] But

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[1] See Anthony v. H. H. S. M. Co. (R. I.), 18 A. 176; Sherman, etc., T. Co. v. Morris, 43 Kan. 282; 23 P. 569; Farnsworth v. W. U. Tel. Co., 53 Hun, 636; 6 N. Y. S. 735; Alta S. M. Co. v. Alta P. M. Co., 78 Cal. 729.

[2] Infra, Ch. XVII.

[3] Infra, Ch. XXIV.

subject to this liability and such limitations as may be imposed in the form of by-laws they constitute the corporation for all purposes of dealing with others. It has been said that "they are the mind and soul of the corporate entity and what they do as the representatives of the corporation the corporation itself is deemed to do." [1] But notwithstanding the force of that expression, and the unequivocal language of statutes, they are at most only agents of the corporation, and though controlling agents, are subject to a higher authority. As to their acts being those of the corporation, the same may be said of any agent, duly authorized.

Where by a deed of settlement the business of a company was placed under the sole and complete control of a board of directors, it was held that notwithstanding their extensive authority they were not empowered to borrow money on behalf of the corporation.[2]

§ 187. Method and power of appointment of other agents by directors.—The power to employ other agents is incidental to the authority of directors to conduct and control the business and property of the corporation. Persons so employed become agents, not of the board of directors but of the corporation itself. But agents may be appointed by the members at corporate meetings, or may be designated in the articles or charter.

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1 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 480. The directors of a corporation have authority to make a *bona fide* settlement of a pending action which will be binding on the stockholders. Donohue v. Mariposa Land & Min. Co., 66 Cal. 317; 5 P. 495.

A resolution of the members of a corporation concerning the disbursement of money, if not adopted or ratified by the directors (where no money could be appropriated or drawn from the treasury without their order,) was held ineffective, as a corporation can only act or speak through the medium prescribed by law, and that was in this case its board of trustees. In re La Solidarte Mut. Ben. Ass'n, 68 Cal. 392; 9 P. 453.

2 Burmester v. Norris, 21 L. J. (N. S.) 5 Exch. 43; 8 Eng. L. & Eq. 487.

Where the general management and control is given to the board of directors considerable latitude of construction will be indulged in construing their powers to employ agents as well as in other matters. The language of the charter of a railroad company was that "the president and managers shall conduct the business of said company." It was held that the purchase of locomotives being a part of the business an agent who was not one of their number, nor interested in the corporate enterprise might be employed by them to make the purchases; and that such agent possessed implied authority under his employment to execute bills or notes of the company in payment of debts thus incurred.[1] Their authority and sanction of the acts of all other agents within the corporate powers may be gathered as well from acquiescence as from formal action.[2]

An agent may be appointed by parol; and by subsequent recognition of his acts such an appointment is usually inferred so as to bind the principal without proof of any corporate act constituting him the agent of the corporation.[3]

§ 188. The appointment of sub-agents.—Without express authority or assent by a principal an agent whose

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[1] Bank of U. S. v. Dandridge, 12 Wheat, 64; Olcott v. Tioga, R. R. Co., 27 N. Y. 546; People's Mut. Ins. Co. v. Wescott, 14 Gray, 440; Johnson v. Jones, 23 N. J. Eq. (8 C. E. Green), 216; Macon, etc., R. R. Co. v. Vason, 57 Ga. 314.

[2] Hoyt v. Sheldon, 3 Bosw. 267; Mobile & M. R. Co. v. Gilmer, 85 Ala. 422; 5 So. 138; Kitchen, St. Gerardeau, etc., R. R. Co., 59 Mo. 514.

[3] Goodwin v. Un. Screw Co., 34 N. H. 378; Bank of U. S. v. Dandridge, 12 Wheat, 64; Yarborough v. Bank of Eng., 16 East 6; Roe v. Dean of Rochester, 2 Camp. 96; Detroit v. Jackson, 1 Doug. Mich. 106; Troy Turnp. & R. R. Co. v. McChesney, 21 Wend. 296; Warren v. Ocean Ins. Co., 16 Me. 439; Badger v. B'k of Cumberland, 26 Id. 428; Bank of Lyons v. Demmon, Hill & Denio, 398; Burgess v. Pue, 2 Gill, 254; Elysville Mfg. Co. v. Okisko, 1 Md. Ch. 392. "Not only the appointment but the authority of the agent may be implied from the adoption or recognition of his acts by the corporation or its directiors," Equitable Gas L. Co. v. Baltimore Coal Tar Mfg. Co., 65 Md. 73; 3 A. 108.

duties involve the exercise of a discretion or trust cannot delegate them to another. Much of the authority of directors is original and underivative. When convened as a board they possess by an irrevocable delegation all the primary and incidental powers conferred upon the corporation by its charter, and may delegate to agents of their own appointment the performance of any acts the corporation itself may perform except those requiring the exercise of the personal discretion and judgment of themselves.[1]

It is important to understand the dividing line between those acts which involve the trust and discretion vested exclusively in the directors and those which may as well be performed by other agents appointed by them. It is their peculiar province to adopt the general policy of the corporation in the carrying out of the purposes for which it is formed, to provide the means therefor, and prescribe the general rules governing the transaction of its business by themselves and all other agents.

Although a board is sometimes said to delegate its authority as such to a quorum or to a committee, the designated body can only act in an executive capacity in carrying out the orders of the board. Whenever it exercises any part of the discretionary or legislative power properly belonging to the board, it acts as the board itself, its expression relating back and forming part of the original expression of the will of the whole body.[2]

§ 189. Directors cannot delegate special powers.—The board of directors cannot delegate their power in respect to the allotment of shares where that power is expressly conferred upon them by the charter.[3] And

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[1] Hoyt v. Thompson, 19 N. Y. 207; Burrill v. Nahant Bank, 2 Metc. 163.

[2] McNeil v. Chamber of Com. (Mass.), 28 N. E. 245, holding that a majority of such committee may act and bind the corporation.

[3] In re Leeds Bkg. Co. L. R., 1 Ch. 561.

where no sale of shares for unpaid assessments was provided for in the charter except upon order of the board of directors, it was held that they could not delegate to a committee authority to order such a sale.[1] To authorize a less number than a quorum of the board to affix the corporate seal, that duty belonging by the charter to the board of directors, a direction from the board itself is necessary.[2]

§ **190. Executive and ministerial duties may be delegated.**—But in the mere execution of the corporate powers as contradistinguished from prescribing or legislating, there is practically no limit within the charter upon the power of agents properly appointed and authorized by the board.

§ **191. Nature of business important.**—What power should be exclusively exercised by the board of direc-

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[1] York, etc., R. R. Co. v. Ritchie, 40 Me. 425.

[2] Van Hook v. Somerville Mfg. Co., 1 Halsey. Ch. 137. The by-laws of a corporation provided that the board of directors or a quorum thereof, might authorize the treasurer to sell its lands and execute proper conveyances under seal, etc. The treasurer and board acting in concurrence executed and delivered to one R. a power of attorney providing that he might enter upon all the lots claimed by the corporation under certain conditions, hold and improve the same. It was held that such power could not be delegated, and the instrument by which its delegation to R. was attempted was void. Gillis v. Bailey, 21 N. H. 149. A corporation's charter provided generally for the sale by the treasurer upon order of the board of directors of shares for non-payment of dues and the by-laws made specific provisions and directions to be followed by that official. At a meeting of the directors an order was made giving a committee consisting of the president and treasurer, alternative authority to adopt the method pointed out in the charter and by-laws, "or by preliminary employment of an attorney to collect said dues, or in both ways as said committee shall think proper." It appeared that the treasurer adopted and pursued the method prescribed in the charter and by-laws in the sale of the shares under consideration. It was held that "The directors cannot legally delegate the power to a commitee to order such sale. And when the order is given by vote of the directors, it should be absolute and not in the alternative such as is shown by the vote given to the committee." York, etc., R. R. Co. v. Ritchie 40 Me. 425. See McNeil v. Boston Chamber of Commerce (Mass.) 28 N. E. 245.

tors and what may be delegated to others depends to a certain extent upon the nature of the business in which it is engaged.

Discounting notes being required by a banking company's charter to be the act of the directors, it was held that their authority to do that could not be delegated to an agent.[1]

But where the charter of a railroad company conferred upon the president and board of directors all the powers granted to the corporation, it was held that the power to establish rates of freight might be exercised by agents appointed by them.[2]

After a board of directors have ordered a sale of real estate,[3] or a transfer of personal property,[4] they may authorize a committee or one of their number to make the sale, and such authority necessarily implies the further authority to execute the requisite conveyances.

§ **192. Construction of agents' authority.**—The various powers of a corporation can only be exercised by the particular officers or agents designated in the charter, and the acts of other persons assuming to exercise them will be void, or at least voidable.[5]

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1 Percy v. Millaudon, 3 La. 568.

2 Manchester, etc., R. R. Co. v. Fisk, 33 N. H. 297.

3 Hoyt v. Thompson, 19 N. Y. 207.

4 Burrill v. Nahant Bank, 2 Metc. 163.

5 Union Mut. Fire Ins. Co. v. Keyser, 32 N. H. 313. An agent of an insurance company expressly authorized to "effect insurance" and "for this purpose to survey risks, fix the rate of premiums and issue policies of insurance signed by the president" was held to have authority to make the preliminary contract equally with the company. In the matter of effecting insurance, he was not limited to the mere duty of receiving proposals and transmitting them to his principal. Sanborn v. Fireman's Ins. Co., 16 Gray, 448. See New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166. Authority to an officer "to convey land to purchasers at his discretion" is sufficient authority to donate land, this word "purchasers" being taken in its broadest sense. State v. Glenn, 18 Nev. 34; 1 P. 186. In California such discretionary power, it is held cannot be delegated by the directors. Bliss v. Kanweah, etc., Co., 65 Cal. 502; 4 P. 507.

An agent put in control of a corporation's affairs with full discretionary powers and subject only to special instructions from the directors, has power to employ laborers and assistants; and in case of the lack of funds with which to pay them, to execute his principal's note in payment.[1]

If the authority of an agent of a corporation is sought to be inferred from former exercise of a power with the knowledge and acquiescence of his principal, the power will be strictly limited to cases in which he was previously allowed to exercise it, and cannot be extended to dissimilar cases.[2]

Directors in control of the affairs of a corporation alone have power to authorize the creation of a lien upon its property to secure borrowed money. An agent engaged in attending to mere routine matters has no such authority without the sanction of the directors.[3]

A bank is not responsible for a fraud committed by means of forged, fictitious, or paid-up pass books, although its treasurer has given currency to them by statements that they correctly represent the sums due.[4] No servant of a corporation can make it responsible as a bailee without its consent unless being a depositary is a part of its regular business.[5] A general agent of a mining company in the absence of special authority cannot make promissory notes binding on the company.[6]

§ 193. Incidental powers and duties of president.—Usage and custom and the necessities and conveniences of

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1 Bates v. Keith Iron Co., 7 Metc. 224.
2 Gillis v. Bayley, 17 N. H. 18.
3 Whitewell v. Warner, 20 Vt. 425.
4 Com. v. Reading Sav. B'k, 133 Mass. 16.
5 Lloyd v. West Branch Bank, 15 Pa. St. 172.
6 N. Y. Iron Mine v. Negauee Bank, 39 Mich. 634.

business attach to certain corporate officers certain functions independent of any express authority from the board of directors. In the exercise of these they are as much agents of the corporation as if authority so to act were specially delegated. The president for instance, as the chief executive officer of the corporation, may bind it by all acts the performance of which is incidental to his office.[1]

When the president of the corporation performs an act pertaining to its business, a presumption exists in favor of the legality of his act. And the same presumption attaches to an act of the vice-president done in the absence of the president, or when he fills a vacancy in the office of president.[2] But in order that

[1] Stokes v. N. J. Pottery Co., 46 N. J. L. 237; Bambrick v. Campbell, 37 Mo. App. 460; Ward v. Davidson, 89 Mo. 445; 10 S. W. 846, Legett v. N. J. Bkg. Co., Saxton Ch. 541; Westerfield v. Radde, 7 Daly, 326; Bliss v. Kaweah Canal, etc., Co., 65 Cal. 502; 4 P. 507; Blen v. Bear River, etc., Mining Co., 20 Id. 602; Davis v. Gemmell, 70 Md. 356; 17 A. 259. Risley v. Indianapolis, etc., R. R. Co., 1 Hun, 202; Crump v. U. S. Min. Co., 7 Gratt. 352; Hodges v. Rutland, & Burlington, R. R. Co., 29 Vt. 220; Catlett v. Starr, 70 Tex. 485; 7 S. W. 844; Ashuelot Mfg. Co. v. Marsh, 1 Cush. 507; Holmes v. Turner Falls Co., 150 Mass. 535; 23 N. E. 305 ; Saltmarsh v. Spaulding, 147 Id. 224; 17 N. E. 316; Bright v. Metairis Cem. Ass'n, 33 La. Ann. 58; Grand Rapids Safety Deposit Co. v. Cincinnati Safe & Lock Co., 45 F. 671; Bridgeport Sav. B'k v. Eldridge, 28 Conn. 556; Un. Mut. Life Ins. Co. v. White, 106 Ill. 67; First Nat. B'k v. Hoch, 89 Pa. St. 324. See Second Ave. R. R. Co. v. Mehrbach, 49 N. Y. Supr. 267; Twelfth St. Market Co. v. Jackson, 102 Pa. St. 269. Where a president of a corporation appears as the active agent in the execution of any work, parties employed by him have a right to assume that he is acting for the corporation, and that his acts in that respect are its acts, and binding upon it. Solomon R. Co. v. Jones, 30 Kan. 601; 2 P. 657. A president of a bank who secures a settlement from an indorser on overdue notes held by the bank, by taking new notes signed and indorsed by the same parties, acts as the agent of the bank, and whatever he does within the apparent scope of his authority to obtain new security is binding on the bank which accepts and holds the security. Cake v. Pottsville Bank, 116 Pa. St. 264; 9 A. 302.

A bank president has not authority as such to sell the corporation's property, and is liable in damages for loss resulting from unauthorized sales. First Nat. Bank of Central City v. Lucas, 21 Neb. 280; 31 N. W. 805. But a valid transfer of the property of a corporation may be made by its president, with the knowledge, consent, and acquiescence of the directors and stockholders, though there is no formal transfer under seal, nor any official action taken by the directors or stockholders. Ft. Worth Pub. Co. v. Hettson (Tex.), 14 S. W. 843.

[2] Smith v. Smith, 62 Ill. 493. In an action against a corporation upon a con-

the circumstances of a particular case may be sufficient to raise a presumption of authority in a bank president to bind the bank in matters beyond the scope of his usual authority, the bank must in some manner be a party to the circumstances, or must be chargeable with knowledge of them.[1]

When an executive committee is authorized by the stockholders to execute a deed, it may be executed by the president under direction of the committee, it being an act the performance of which properly belonged to the function of the president.[2] If the tender of an assessment is made to the president at the office of the corporation during business hours his refusal to accept it will be deemed the refusal of the corporation, in the absence of evidence showing his want of authority to accept it.[3] And a conditional subscription accepted by the president will bind the corporate body.[4] But be-

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tract made with one who was admitted to be its president and general managing agent, it was held that this admission was sufficient evidence of his authority to make the contract and that it was unnecessary to show any vote or other corporate act giving him such authority. Crowley v. Mining Co., 55 Cal. 273.

[1] Wheat v. Bank of Louisville (Ky.), 5 S. W. 305. The purchase and sale of its stock by the president of a national bank, for the purpose of getting the stock into the hands of desirable persons, will not render the bank liable for fraud in its sale, the purchases being accomplished by means of funds of the bank loaned to the president, and the proceeds of the sales applied in payment of such loans, no actual authority or agency being shown and the stock being transferred to the president individually and registered in his name; Rev. St. U. S. Sec. 5201, moreover, forbidding national banks to purchase or hold their own stock except to secure a *bona fide* debt. Prosser v. Bank, 109 N. Y. 677. A corporation is not bound by the result of a suit brought by its tenant, though it knew of the suit, and its president, without authority from the board of trustees, employed an attorney to look after its interest in the suit. Wilson v. Brookshire (Ind.), 25 N. E. 131. A resolution of a board of directors authorizing a director "to make contracts of sale of the lands of the company," does not authorize him to convey land as the attorney in fact of the corporation. Green v. Hugo (Tex.) 17 S. W. 79.

[2] Merchant's B'k, etc., v. Goddin, 76 Va. 503. See also Deller v. Staten, Island, etc., Club, 56 Hun, 647; Shaver v. Hardin (Ia.), 48 N. W. 68.

[3] Mitchell v. Vt. Cooper Min. Co., 67 N. Y. 280. See Plumb v. Cattaraugus Co. Mut. Ins. Co., 18 N. Y. 392; Dougherty v. Hunter, 54 Pa. St. 380.

[4] Pittsburgh, etc., R. R. Co. v. Stewart, 41 Pa. St. 54.

fore he can indorse and negotiate promissory notes[1] in behalf of the corporation, or execute a mortgage upon its property[2], it must in general be shown that authority to do so has been given him. Nor can he jointly with the treasurer confess judgment against the corporation,[3] or execute a power of attorney authorizing another to do so.[4] But special authority for that purpose is not required. The fact that he is the general manager of the corporate concern attending all its ordinary business includes an authority to give, in the name of the corporation, a promissory note for indebtedness arising in the course of business.[5]

The president of a railroad company acting as its general financial agent in the matter of transferring its assets and raising funds for paying the expenses of its road, may indorse and sign notes and mortgages given to the company in aid of the enterprises.[6] The pres-

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1 Nat. Bank v. Navassa, etc., Co., 56 Hun, 136; Joliet E. L. & P. Co. v. Ingalls, 23 Ill. App. 45; Lawrenceville, etc., Co. v. Parker, 32 N. Y. St. R. 234; 10 N. Y. S. 831. Bacon v. Miss. Ins. Co., 31 Miss. 116; In re Seymour (Mich.), 47 N. W. 321; McCullough v. Moss, 5 Denio, 567; Marine Bank v. Clements, 3 Bosw. 600. Compare Fitzgerald v. Construction Co., 11 S. Ct. 36; Siebe v. Mach. Wks. (Cal.), 25 P. 14.

2 England v. Dearborn, 41 Mass. 590; 6 N. E. 837, in which the transaction was not considered any more binding upon the corporation by the fact that the president was also treasurer.

3 Adams v. Cross-Wood Pr. Co., 27 Ill. App. 313. But in Joliet El. Light & Powder Co. v. Ingalls, 23 Ill. App. 45, it was held *prima facie* sufficient to authorize entry of judgment where judgment notes of a corporation, with warrants of attorney authorizing confessions of judgment, purported to have been signed and executed by the president of the company and attested by the secretary and sealed with the corporate seal by order of the directors.

4 Joliet E. L. & P. Co. v. Ingalls, supra.

5 Castle v. Belfast Foundry Co., 72 Me. 167. And a corporation which has executed by its president a contract, by which it agrees to give its judgment note thereby authorizes its president to execute the warrant of power of attorney attached to such note. McDonald v. Chisholm, 131 Ill. 273, 23 N. E. 596.

6 Irwin v. Bailey, 8 Biss. 523. But the president of a railroad company has no power by virtue of his office merely to let a contract for the construction of its road. Templin v. C. B. & P. R. Co., 73 Ia. 548; 35 N. W. 634; Griffith v. Same, 74 Ia. 85; 36 N. W. 901. Nor to direct an agent to make an agreement with a firm to take up labor tickets of the company. Stanley v. Sheffield, L. I. & C. Co., 83 Ala. 260; 4 So. 34.

ident and cashier of a bank have no power to release an indorser from his liability as such. It is not part of their duties to make such agreements. It belongs to the board of directors to provide the terms and conditions for loaning money and to allow the president and cashier to alter these terms would be taking it out of the hands of those into whose keeping it has been given by the stockholders.[1]

Whatever means are necessary and convenient for the execution of the powers given to the president or other agent, he has as good a right to employ as if the manner and instruments had been specified.[2] Where not restricted in the charter or by-laws the president ordinarily has authority to employ and dismiss counsel in defending and prosecuting suits.[3]

In some corporations the business management devolves upon the vice-president while the president is only formally at the head in the graver and more important matters. When such is the case the president cannot represent the corporation in those matters which usually appertain to that office, but the same devolves upon the vice-president.[4]

§ **194. Secretary, treasurer, superintendent, etc.**—The duties belonging to other officers of a corporation are

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[1] Bank of U. S. v. Dunn, 6 Pet. 51; Manderson v. Com. Bank of Pa., 28 Pa. St. 379; Hyde v. Larkin, 35 Mo. App. 365.

[2] Augusta Bank v. Hamblet, 35 Me. 491.

[3] Merrill v. Consumer's Coal Co., 114 N. Y. 216; 21 N. E. 155; Western B'k of Mo. v. Gilstrap, 45 Mo. 419; Coleman v. West Va. Oil, etc., Co., 25 W. Va. 148; Am. Ins. Co. v. Oakley, 9 Paige Ch. 496; Mumford v. Hawkins, 5 Denio, 355.

[4] The directors of an insolvent corporation authorized its vice-president "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interest of the association, and to use the corporate seal for such purpose;" provided, that the treasurer "be authorized to receive and disburse all moneys belonging to the association, and act as manager of the same until its business is closed." *Held*, that the vice-president was authorized to execute an assignment for the benefit of creditors. Huse v. Ames (Mo.), 15 S. W. 965.

such as are fixed in the constating instruments or are customarily assigned to them. There is a public recognition of the propriety of the secretary, cashier,[1] treasurer and the like having charge of certain branches of the corporate business and those with whom they deal may safely attribute to each of them the requisite authority within the scope of duties usually performed by similar officers in corporations and business establishments generally. The natural and legal presumptions heretofore pointed out as being raised by allowing those official functions to be exercised furnish third parties without notice of any limitations upon the usual powers ample protection as against the corporation. There is no general or certain rule for measuring and defining the duties of secretaries of corporations. Their duties vary sometimes according to the character of the corporate enterprise, and in other cases according to the division of duties made in the particular company. Secretaries of ordinary trading corporations often have a considerable scope of authority, the buying of merchandise, making of contracts, superintendence of other employes and the like being included among their duties.[2] In mining and transportation companies where

[1] It is not responsible negligence in a cashier of a bank to pay the overdraft of a customer of character and business integrity, though not having property subject to execution, as reasonable conformity to the customs and methods in vogue among prudent bankers is the degree of diligence required in such cases, and the directors cannot be made liable on mere proof that an account was overdrawn, and a loss thereby sustained. Wallace v. Lincoln Sav. Bank (Tenn.), 15 S. W. 448.

A cashier has not authority to assure an indorsee of a note payable to the bank that he will not be held liable. Thompson v. McKee, 5 Dak. 172; 37 N. W. 367.

Where it was shown that the cashier had no authority to make checks, and that the checks were paid by the drawee, defendants were *prima facie* liable in trover for their face amount. Andersen v. Kissam, 35 F. 699, holding also that the fact that some of the moneys thus deposited by the cashier were paid in by defendants at his request does not affect their liability, or go in mitigation of damages.

[2] See Salt Lake F. & M. Co. v. Mammoth M. Co. (Utah), 23 P. 760, defendant

there are usually a greater number of departments and heads of departments their duties are usually more limited.[1] The duties of superintendents and general managers are usually very indefinite, and, as in the case of secretaries, vary so as to conform to the character and necessities of particular corporations. Sometimes a superintendent is in entire control of the business of the corporation in which case he virtually is the corporation and his acts bind it almost without limit.[2] But he has no right to use the corporate name or funds in his individual affairs, however extensive his powers.[3]

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held liable for work and materials furnished at request of secretary who was also general manager. Washanon L. & L. Co. v. Sloan, (Pa.) 7 A. 102, company held liable on note given by secretary and treasurer, but holding that they had no implied authority to release without consideration one of several makers of a note owned by the corporation.

[1] In Barnett Hoares & Co. v. South London Tramways, Co., L. R., 182 B. Div. 815, a tramway company had employed contractors to execute certain works. The plaintiff had advanced money to the contractors and taken as security an assignment of retention moneys which the secretary of the company had falsely represented to be in the hands of the company. In an action against the company to compel it to make good these representations, it was held that it was not within the scope of a secretary's authority to make such representations, and the defendants were not estopped from denying that such money was due. In Read v. Buffurn, 79 Cal. 77, it was held that an assignment of an account for goods manufactured and sold by a corporation, made in its name by its secretary, was invalid in the absence of evidence of his authority to make it. See also Newlands v. Nat. Employes A. Ass'n, 53 L. T. (N. S.) 242; Wahlig v. Standard Pump Mfg. Co., 5 N. Y. Supp. 420.

[2] See Topeka P. A. B. v. Martin, 39 Kan. 750; 18 P. 941; Whitaker v. Kilroy, 70 Mich. 635; 38 N. W. 606; Ind. R. M. Co. v. St. L. Ft. S. & W. R. Co., 120 U. S. 256; 7 S. Ct. 542.

Where the by-laws of a mining corporation declare it the duty of the general manager to "take charge of the business of selling the ores mined," he has authority to enter into a contract with a smelting company for the sale to it of all the ores to be mined within a given period. Robert E. Lee Silver Min. Co. v. Omaha & Grant Smelting & Refining Co., (Colo.) 26 P. 326.

[3] In Planter's Rice Mill Co. v. Olmstead, 78 Ga. 586; 3 S. E. Rep. 647, the superintendent had borrowed money for his individual use, giving as security the receipt of the corporation for a quantity of rice which the receipt stated was stored in the mill in his name. It was held in an action brought against the corporation for the money advanced, that it was not liable, as the plaintiff should have inquired whether the superintendent's representations were true. See also Societe des Mines D'Argent et Fonderies de Bingham v. Mackintosh, (Utah) 24 P. 669.

Nor can he where his duties and powers are prescribed and limited exceed them so as to bind the corporation,[1] or usurp functions belonging to the board of directors or other agents.[2]

It seems to be settled in Massachusetts that the treasurers of savings banks and incorporated cities, towns and villages have no implied authority to borrow money and bind these corporations for repayment of the same although the corporate name be used in the transaction.[3] The weight of authority elsewhere is to the same effect, though the authorities are not uniform.[4] Whatever doubts may be entertained with respect to other corporations, there is nothing in the nature of the duties of treasurers of railroad companies which implies that they, by virtue of their office, have authority to borrow money for the companies for which they act and to give notes therefor.[5] Treasurers have no implied

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1 As by employing a surveyor to establish a boundary line; Hartford I. M. Co. v. Cambria M. Co. (Mich.), 45 N. W. 351; by a sale of a railroad; Bowen v. Mt. Wash. Ry. Co., 62 N. H. 502; by purchase of supplies, there being a by-law limiting his authority in the matter; Rathburn v. Snow, 3 N. Y. S. 925; by retaining an attorney; St. L. F. B. & W. R. Co. v. Grove, (Kan.) 18 P. 958. See also Dale v. Donaldson L. Co., (Ark.) 2 S. W. 703.

2 Rathburn v. Snow, 3 N. Y. S. 925; Bowen v. Mt. Wash. Ry., 62 N. H. 502. A civil engineer having the management of a railroad company's affairs temporarily has no implied authority to affix his seal to a contract for grading as that of the company. Saxton v. Tex. S. F. & N. R. Co., 4 N.M. 201; 16 P. 851.

3 See Dedham Inst. for Savings v. Slack, 6 Cush. 408; Bradbe v. Warren F. C. Sav. B'k, 127 Mass. 107; Towell F. C. Sav. B'k v. Winchester, 8 Allen, 109. And the following authorities in that state establish the doctrine that the same rule applies also to manufacturing and trading corporations. Packard v. First Universalist Soc., 10 Met. 427; E. Carver Co. v. Mfg. Ins. Co., 6 Gray, 214, 220; Torrey v. Dustin Monument Ass'n, 5 Allen, 327; Paige v. Stone, 10 Met. 160; Mahone v. Manchester & L. R. Co., 111 Mass. 72; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; Webber v. Williams College, 23 Pick. 303; Haywood v. Pilgrin Soc., 21 Pick. 270.

4 See First Nat. Bank v. C. B. C. W. W. Co., 56 Hun, 412; Moshanon L. & L. Co. v. Sloan, (Pa.) 7 A. 102; Page v. Fall Riv. W. & P. R. Co., 31 F. 257.

"The treasurer of a savings bank is not *virtute officii* invested with the power of borrowing money for the institution, and pledging its security as collateral." Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513; 7 A. 318.

5 In Craft v. S. Boston R. Co., 150 Mass. 207; 5 L. R. An. 641, the treasurer had borrowed a sum of money from plaintiff and given the company's note therefor,

authority to release, without consideration, parties from the payment of debts due the corporation.[1]

§ **195. Execution of conveyances under seal.**—All formal and important acts of corporations are usually evidenced by affixing its seal in addition to its signature executed by an agent thereunto duly authorized; and though not absolutely required to have a seal in order to give validity to their ordinary acts, most or all of them are authorized to use a seal. The presence of the corporate seal is essential to the validity of a conveyance of real estate in all states requiring such conveyance to be by deed under seal.[2] And in some states where private seals

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and used the money in paying indebtedness of the company incurred by him in order to cover previous embezzlements which he had been guilty of. One of the by-laws provided that "the treasurer shall, in the name of the company sign and indorse all promissory notes and drafts of the company as he may be required by the directors; and the same shall be countersigned by the president. In addition to the count on the note there was one in *assumpsit* for money had and received. But the court held that no recovery could be had on either count and said:—"No obligation on the part of the defendant ought to be implied in this case because Reed was a defaulter and the money was used to cover up his defalcations by paying debts of the company which the money of the company, if he had not embezzled it, would have been used to pay. The only reasonable inference is, that Reed's primary purpose in using the money in this way was to escape detection and benefit himself. Whether it was a benefit to the company that he was able to obtain and use the money for this purpose is necessarily uncertain. The money was not borrowed *bona fide* for the use of the company." See also R. R. Nat. Bank v. Lowell, 109 Mass. 214; Agawan Nat. Bank v. South Hadley, 128 Mass. 503.

[1] Moshannon L. & L. Co. v. Sloan, (Pa.) 7 A. 102.

[2] Mott v. Danville, Sem. 129 Ill. 403; 21 N. E. 927. A mortgage by a corporation by its attorney in fact is sufficient, if executed in the name of the corporation under the attorney's own hand and seal when the power of attorney is under seal. First Nat. Bank v. Salem C. F. M. Co., 36 Fed. Rep. 89.

Although a corporate seal impressed upon a promissory note is no part of the note itself, yet if it contain the name of the corporation in full, it may be taken, with other facts, to explain the intent of the makers of the note who, in signing, have affixed to their names the words "President," and "Sec. G. M. Co.," respectively. Guthrie v. Imbrie, 12 Or. 182; 6 P. 664.

It is not necessary that an assignment of a mortgage executed to a corporation should be made by an attorney of the corporation, appointed for that purpose, as the mortgage has no existence independent of the debt, and is therefore assignable as a debt of the corporation. Chilton v. Brooks, 71 Md. 445; 18 A. 868.

have been abolished corporations are still required to seal their deeds with their corporate seals.[1]

But any seal other than that of the corporation ordinarily in use by the corporation may be used as its common seal, and will be sufficient although the deed contain no reference to it as such.[2] When, however, a corporation has adopted a common seal of a particular character or device, it should be used to make a valid deed.[3] To constitute a sealing there must be an actual impression upon the paper or some substance attached thereto capable of receiving it.[4] When the common seal of a corporation appears to be affixed to an instrument, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority; and the seal is itself *prima facie* evidence that it was affixed by proper authority.[5] A deed signed by the president duly authorized to sign it, and acknowledged by him as the free and voluntary act of the corporation with its seal attached, is properly executed.[6] But if the seal has been attached by some one not authorized to do so, this may be shown to impeach the deed,[7] though if, subsequent to an unauthor-

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1 3 Wash. on Real Prop. 288.

2 1 Wood, Conv. 192; Dig. Fait. A. 2; Shep. Touch. 57; Mill Dam Foundry v. Hovey, 21 Pick. 417, 428.

3 Stebbins v. Merritt, 10 Cush. 27, 34; Koehler v. Black River Co., etc., 2 Black. 715. A deed purporting to be the deed of a corporation authorized by law to have and use a common seal but signed by the president and secretary of the corporation without authority of the trustees and not sealed with the corporate seal was held void. Mott v. Danville, Sem. 129 Ill. 403.

4 Hendee v. Pinkerton, 14 Allen, 381; Tanner, etc., Co., v. Hall, 22 Fla. 391; Royal Bank of Liverpool v. Grand Junction R. & D. Co., 100 Mass. 444. A facsimile printed upon a blank form which is filled up does not thereby become a sealed instrument. Bates v. Boston, etc., R. R. Co., 10 Allen, 251.

5 Bliss v. Canal Co., 65 Cal. 502.

6 Murphy v. Welch, 128 Mass. 489; Mo. F. C. Works v. Ellison, 30 Mo. App. 67; Hopper v. Lovejoy, (N. J.) 21 A. 298.

7 Koehler v. Black River, etc., Co., 2 Black. 715; Bliss v. Canal Co., supra. Slight evidence is insufficient to overcome the presumption in favor of the authority of one who has affixed the corporate seal to an instrument. Parker

ized sealing, the instrument be delivered by the proper authority or by direction of a stockholders' meeting, the act becomes that of the corporation and amounts to a sealing by it.[1]

§ 196. The place of the agent's transactions immaterial.—Subject to such qualifications and conditions as the various state sovereignties may impose on the exercise of privileges by foreign corporations, the latter are no more restricted to place in their operations through agencies than are natural persons.[2] The validity of acts of agents and the extent of their authority relate to the charter of the corporations they represent and the law of the place where these questions are to be subsequently passed upon.[3]

§ 197. Agents cannot serve an interest adverse to that of the corporation.—What has elsewhere been regarded as the fiduciary relation of directors applies equally to all other corporate officers and agents.[4]

In matters touching the agency agents cannot act so

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v. Receiver, 49 N. J. L. 465; 9 A. 682; and the burden of proof to show the lack of authority is on the party denying it. Schallard v. Eel River S. Nav. Co., 70 Cal. 144; 11 P. 590; Fidelity Ins. T. & S. D. Co., v. Shenandoah Val. R. Co., 32 W. Va. 244; 9 S. E. 180; Catlett v. Starr, 70 Tex. 485; 7 S. W. 844. The presumption is not indulged where one assuming to sign for the corporation has affixed his own private seal instead of that of the corporation. See Fitch v. Lewiston S. M. Co., 80 Me. 34; 12 A. 732; Saxton v. Tex. S. F. & N. R. Co., 4 N. M. 201; 16 P. 851; Lay v. Austin, (Fla.) 7 So. 143.

[1] 1 Wood, Conv. 192, See also Spring Garden Bank v. Hulings Lumber Co., 32 W. Va. 357; 9 S. E. 243.

[2] Christian Union v. Yount, 101 U. S. 352; Bank of Augusta v. Earle, 13 Pet. 519; Galveston R. R. v. Cowdrey, 11 Wall. 459; Leasure v. Union Mut. Life Ins. Co., 91 Pa. St. 491; Wood Hydraulic Hose Min. Co. v. King, 45 Iowa, 560; Cowell v. Spring Co., 100 U. S. 55; Doyle v. Continental Ins. Co., 94 Id. 535; Home Ins. Co. v. Davis, 29 Mich. 238.

[3] Wright v. Bundy, 11 Ind. 398; Humphreys v. Mooney, 5 Col. 282; Hilley v. Burlington, etc., R. R. Co., 70 N. Y. 223; Pope v. Terra Haute Car Mfg. Co., 87 Id. 137.

[4] Infra, § 429. It is not a breach of duty by the treasurer of a corporation to expose its property to be attached by one of its creditors. The Literati v. Heald, 141 Mass. 326; 5 N. E. 147.

as to bind their principals where they have an adverse interest in themselves.[1]

The rule as applicable to the managers and agents of corporations should in no particular be relaxed. The stockholders necessarily confide to the integrity, fidelity and watchfulness of those whom they have selected to represent them and their interests. This duty their agents have assumed ; this the law imposes upon them ; and this those for whom they act have a right to expect. The shareholders and members are not present to watch over their own interests ; they cannot speak on their own behalf ; they must trust to the fidelity of their representatives. If the latter discharge their trusts and duties faithfully, the law interposes for their protection and defense against personal liability ; if they depart from the line of duty and take to themselves or waste the property or interests entrusted to them, the law, on the application of the injured shareholders or members, promptly steps in to apply the corrective and restore to the injured what they thus have lost.[2]

The same principle which forbids an agent representing his own interests adverse to his principal's, also forbids his acting for a third party having an interest adverse to his principal. Its fairness or unfairness is im-

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1 Justice Story says:—" This rule is founded upon the plain and obvious consideration that the principal bargains in the employment for the exercise of the disinterested skill, diligence and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent that he will act with a sole regard to the interests of his principal as far as he lawfully may; and even if impartiality could possibly be presumed on the part of an agent where his own interests were concerned, that is not what the principal bargains for; and in many cases it is the very last thing which could advance his interests." Story on Agency, sec. 210.

2 Cumberland Coal Co. v. Sherman, 30 Barb. 553. An agent of a railway corporation charged with the duty of selecting a route or line of railway cannot for a consideration paid to himself agree to select a particular route, and such a contract was held void. Holliday v. Davis, 5 Or. 40.

material. It is constructively fraudulent and may be avoided at the election of the principal.[1]

§ **198. Ratification a waiver of remedy.**—But since the rule is established for the benefit and protection of the principal, he may waive his right to avoid it; and if, after full knowledge of the transaction, he ratifies it, it will bind him notwithstanding the interest of his agent.

And that an agent may, by mutual consent and with full knowledge, represent two persons in a transaction relating to or embracing a subject matter respecting which their interests may be adverse or conflicting, having their assent so to do, admits of no doubt.[3]

§ **199. Cannot purchase corporate property.**—The cases which most frequently arise are those in which being appointed to sell an agent becomes the purchaser, or being appointed to buy becomes the seller. But it is a rule equally applicable to all cases, that no agent will be permitted to act for himself, in a transaction in which he represents another, without his principal's consent.[4]

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1 Aberdeen Ry. Co. v. Blackie, 1 McQueen, H. L. 461; The New York Buildings Co. v. McKenzie, 3 Paton, H. L. 378; Bisham's Prin. Eq. 106; 18 O. St. 182.

2 U. S. Rolling Stock Co. v. Atlantic & G. W. R. R. Co., 34 O. St. 450.

3 Where the same person was made the agent of two mining corporations in the same vicinity, and it became necessary for one to deal with the other, he was presumed to have the same power to act for both that would be possessed if there were two agents acting separately, and may dispose of property in the same way; and such double authority would dispense with such formalities as could not be complied with where one man acts for both companies. The Adams Mining Co. v. Senter, 26 Mich. 73. In this case the court in announcing its opinion said:—"The authority of agents, where no law is violated, is as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions. Every partnership involves such double relation. Every survey of boundaries by a surveyor jointly agreed upon would come within similar difficulties. There can be no presumption that the agent of two parties will deal unfairly with either."

4 Where the president of a corporation acting as the agent of a third party loaned money to the corporation without consulting the directors or trustees or the party whose money he loaned, and used a portion of the money thus used,

But a director of a corporation who has in good faith advanced it money to pay its debts, and to secure payment taken a mortgage on its property, may become a purchaser of such property at a foreclosure sale.[1]

in payment of his own salary as president, and the transaction was ratified by his casting vote as president of the board, it was held that his personal interest rendered the whole proceeding void. Chamberlain v. Pac. Wool G. Co., 54 Cal. 103. See also Preston v. Laughran, 12 N. Y. S. 313.

When the note of the corporation signed by the president and secretary was given for an individual indebtedness, the same was held not to be the note of the corporation. Hall v. Auburn Turnp. Co., 27 Cal. 255. A resolution was passed by the board of directors of a mining company to borrow money with which to pay the debts of the corporation and to give a mortgage on its property to secure the same. The president being also one of the directors bought up the debts and had them assigned to a firm in which he was interested. He was not allowed to foreclose the mortgage in satisfaction of the lien claimed in favor of the firm, although it did not appear whether plaintiff had secured the claims at a discount or not. The court said on that point that the policy of the law did not permit any inquiry into that question. Davis v. Rock Creek L. F. M. Co., 55 Cal. 359. See also Finch v. Riverside & A. Ry. Co., (Cal.) 25 P. 765. In such cases the corporation is not chargeable with the knowledge nor bound by the acts of its officers. Koehler v. Dodge, (Neb.) 47 N. W. 913.

The general principle is sustained and exemplified in San Francisco W. Co. v. Patten, (Cal.) 25 P. 135; holding that the secretary of a corporation, who is also its general manager, and to whom all its affairs are committed, is guilty of a fraud against the corporation in secretly purchasing its property in his own name at execution and tax sales.

[1] Saltmarsh v. Spaulding, 147 Mass. 224; 17 N. E. 316.

CHAPTER X.

ACQUISITION, OWNERSHIP AND DISPOSAL OF PROPERTY BY ORDINARY METHODS.

§ **200. The common law rule.**—The power to purchase, hold and convey real estate was an incident of civil

corporations at common law. They might take hold, alienate and transmit in succession both personal and real property and contract with reference to the same like individuals.[1]

In most of the states limitations by statute have been placed upon the power of corporations to acquire and hold land. These constitute the only restrictions upon the common law right. Kent says :—"We have not, in this country, re-enacted the statutes of mortmain or generally assumed them to be in force, and the only check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated and which usually confine the capacity to purchase real estate to specified and necessary objects, and in the force to be given to the exception of corporations out of the statute of wills."[2] Accordingly a corporation is presumed in the

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[1] 1 Blk. Com. 475; Trustees First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Post v. Ætna Ins. Co., 43 Barb. 351; New England Fire Ins. Co. v. Robinson, 25 Ind. 536, 541; Binney's Case, 2 Bland, Ch. 142; The Banks v. Poitiaux, 3 Rand. 136; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280; New York Dry Docks v. Hicks, 5 McLean, 111; Page v. Heineberg, 40 Vt. 81.

[2] 1 Kent's Com. 356. Pennsylvania should be mentioned, however, as an exception to this otherwise universal rule in the United States. The judges of the Supreme Court in that state were at an early date appointed to examine and report to the legislature such of the English statutes as were in force there. They reported that the statutes of mortmain were "So far in force that all conveyances . . . . . . made to a body corporate for the use of a body corporate are void, unless sanctioned by charter or act of assembly." 3 Binney, 595, 626. See Meth. Church v. Remington, 1 Watts, 218; Miller v. Porter, 53 Pa. St. 292. Subsequent statutes embodied substantially the provisions of the English statutes of mortmain making purchases of land by corporations without the license of the commonwealth subject to forfeiture. Under a provision in the charter of a charitable corporation, limiting the amount of real and personal property it can hold at one time, such corporation can only take such part of a legacy given it as will, with the property already owned, less its indebtedness, make up the maximum amount. Wood v. Hammond, (R. I.) 17 A. 324, holding also that an amendment to the charter, after testator's death, increasing the amount such corporation can hold, will not enable it to take the residue of the legacy.

In New York, where there is a prohibition against the taking of property beyond a certain value, by a corporation, a devise or bequest to a corporation

absence of evidence to the contrary to have the right to purchase and hold real estate.[1]

§ **201. Property can be acquired only for legitimate uses of corporations.**—This power, like others conferred upon corporations by express words or implication, can only be exercised for the accomplishment of the objects for which they are formed. The acquisition of property for a purpose foreign to its legitimate uses as a corporation would be an *ultra vires* act. A company formed for manufacturing purposes, for instance, would require lands upon which to construct its plant and buildings, within which to operate its machinery and store its products; but it would have no more right under a charter authorizing it to engage in manufacturing and to acquire all lands necessary to enable it to successfully prosecute that business to invest in town lots for speculative purposes than to purchase and operate a stage line to meet the necessities of public travel.[2]

§ **202. Character of corporation important.**—In determining whether, upon a given acquisition of property, a corporation has exceeded its implied powers or confined itself within them, much will depend upon the character of the particular corporation and the nature of the business for which it was formed. Banks are organized

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which will exceed that value is void as to the excess. In re McGraw's Estate, 111 N. Y. 66; 19 N. E. 133. Under Const. Pa., Art. 17, § 5, which forbids corporations that are common carriers to hold or acquire land except such as may be necessary for carrying on their business, land held by a railroad corporation contrary thereto does not thereby escheat to the state, since the section affixes no penalty for its violation. Following 19 A. 291, and reversing 7 A. 756, Sterrett and Clark, JJ., dissenting, Commonwealth v. New York, L. E. & W. R. Co. (Pa.), 21 A. 528.

[1] People v. La Rue, 67 Cal. 526; 8 P. 84.

[2] See Pacific R. R. Co. v. Seeley, 45 Mo. 212; Rennselaer, etc., R. R. Co. v. Davis, 43 N. Y. 137; Occum Co. v. Sprague Co., 34 Conn. 529; Coleman v. San Raphael Turnp. Co., 49 Cal. 157; Case v. Kelly, 133 U. S. 21; Com. v. N. Y. L. E. & W. R. Co., 132 Pa. St. 591; 19 A. 291.

for commercial purposes, and their holding of real estate should be confined and is usually limited by statute to an amount sufficient and necessary for their places of business and such as may be acquired incidentally in the transaction of their business. In a case involving a review of this subject, Wagner, J., said :—"Their business is to discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt, the buying and selling of bills, bullion, and the lending of money on personal security. To permit them to lend their money on real estate security would be destructive to their efficiency, and defeat the object had in view in their creation. Instead of being agents for purposes of trade, dealing in commercial paper, discounting notes, and furnishing the necessary facilities for loans, they would have their capital locked up in landed property, and thus be powerless to carry on the business which induced their organization."[1]

§ **203. The state alone can object.**—It is usual to insert in the charter or in a general statute a clause, limiting the amount of real estate corporations may hold.[2] But if a corporation exceeds this prescribed amount by an original purchase, nobody but the state can interfere with its holding the property thus acquired;[3] and if its property by a rise in its value comes to exceed the amount prescribed in the charter, its title will not thereby be impaired.[4]

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1 Matthews v. Skinner, 62 Mo. 329.

2 An act which provides for the acquisition and holding of land for the purpose of public worship, by religious denominations, whether incorporated or not, does not empower an unincorporated local religious association to take a bequest of personal property. Rhodes v. Rhodes, 88 Tenn. 637. See also Ruppell v. Schlegel, 55 Hun, 183. A conveyance by or to a *de facto* corporation cannot be avoided by reason of defective organization. Doyle v. Land, etc., Co., 46 F. 709.

3 American Mortg. Co. of Scotland v. Tennville (Ga.), 13 S. E. 158.

4 Kent, Com. 282, 283; Bogardus v. Trinity Church, 4 Sandf. Ch. 633. In this case the income of the property had increased from 30 pounds sterling per year

The rule that no one but the state can object does not apply where conveyances have been executed, but no part of the contract has been executed if the purchase or sale by the corporation is clearly *ultra vires*. In that case, either party may repudiate the contract, and any stockholder may enjoin its completion.[1]

§ 204. Amount of capital stock no measure.—The amount of capital stock limited in the charter does not measure the amount in value of the property which a corporation may legally acquire and hold. In the absence of statutory prohibitions, it may accumulate and hold both personalty and real property and contract obligations within the objects for which it was organized to an unlimited amount without regard to the amount of capital fixed in the charter or agreed upon in the articles of incorporation.[2]

A reduction in the capital stock, therefore, does not *per se* affect the power of the corporation to purchase and hold real estate. And a purchase made for a purpose which comes within its proper powers may be held by it, notwithstanding the failure of the object for which the purchase was made.[3]

§ 205. Statutory limitations upon the power.—Numerous reasons have been advanced from time to time, in favor of the restrictions upon the power of corporations to deal in real estate. They were summarized by Christiancy, J., in Thompson *v.* Waters.[4] "1. The danger of

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to $300,000. See also Harpending v. Dutch Church, 16 Pet. 492; Hubbert v. Trinity Church, 24 Wend. 587; Harvard College v. Boston, 104 Mass. 470.

[1] In re McGraw's Estate, 111 N. Y. 66; Wood v. Hammond, (R. I.) 17 A. 324; Rhodes v. Rhodes, 88 Tenn. 637; Gilbert v. Hole (S. D.), 49 N. W. 1; Infra, § 774.

[2] State v. Morristown Fire Ass'n, 3 Zab. 195; Parry v. Merchants' Exch. Co., 1 Sandf. Ch. 280.

[3] Old Colony R. R. Co. v. Evans, 6 Gray, 25.

[4] 25 Mich. 214.

their speculating in land to large amounts, keeping it unimproved, and thereby retarding the settlement and cultivation of the country, or, if improved, preventing settlers from obtaining clear and independent titles, and introducing a system of tenancies in which the tenants would be in a great measure dependent upon the corporations; 2. The holding of such land for a long period of time, transmitted by perpetual succession, without any change, as in the case of natural persons; and 3. The influence which wealthy corporations, holding large bodies of land in the state, might exert over the legislature."

The restrictive statutes are generally directed to the prevention of perpetuities and designed to prevent accumulations of property in hands which do not relax by death, and permit distribution, division and free alienation, as in the case of ownership by natural persons. The same policy justifies such statutes as led to the enactment of the statutes of mortmain which derive their designation from the words *in mortu manu*—in a hand that is dead. The mortmain acts were first directed against ecclesiastical bodies to prevent the withdrawal of large quantities of real estate from feudal services and free transmission from one person to another.[1]

Later on, the provisions of these statutes were extended to civil or lay corporations, and they were placed equally within the prohibition of the mortmain statutes. They made lands conveyed to any third person for use of the prescribed corporations liable to forfeiture in like manner as if conveyed in mortmain.[2]

There are evidences that restrictions were likewise placed upon this power of corporations by the civil law. Gibbon states that it contained provisions that no real

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[1] Co. Lit. 2 b.; 1 Kyd on Corp. 78, 79; 1 Blk. Com. 479.
[2] 1 Kyd on Corp. 95.

estate should be given or bequeathed to any corporate body without a special privilege or dispensation from the emperor or senate.[1]

§ **206. Nature and operation of such statutes.**—Statutory limitations do not, of their own inherent force, have the effect to impart the taint of illegality to private transactions between corporations and individuals, however much the powers of the former are transcended in consummating them. Their quality is rather that of an express reservation of authority to call such transactions in question for abuse of corporate powers with respect to the acquisition and ownership of property than of an express prohibition.

The wrong of this nature is one to the community at large, and the right of redress abides dormant in the state government until set in motion by the attorney-general as its legal representative.[2] Therefore it is no ground of action or defense by even a stockholder after a transaction in real estate or personalty has been consummated or partly performed, by both or one of the parties acting in good faith and without notice of the ulterior purpose, that the acquisition or possession of the property is not authorized by the charter of a corporation.

In a suit in ejectment by a water and mining company, one defense set up was that the land was not necessary for the purposes of the corporation. In passing upon such defense, Field, Ch., J., said:—"Whether or not the premises in controversy are necessary for

[1] Vol. 2, p. 355; 1 Browne, Civ. & An. L. 142.

[2] Heiskell v. Chickasaw Lodge, 3 Pickle, Tenn. 668; 11 S. W. 825; Jones v. Renshaw, 130 Penn. 327; 18 A. 651. Bone v. Del. & H. Canal Co. (Pa.), 5 A. 751. But a corporation holding lands under a lease holds it subject to the legal construction and subject to all implied conditions necessary to give validity to it. Holt v. Town of Antrim, 64 N. H. 284; 9 A. 389.

thosè purposes, it is not material to inquire ; that is a matter between the government and the corporation, and is no concern of the defendants. It would lead to infinite inconveniences and embarrassments if in suits by corporations to recover the possession of their property for the purposes of their incorporation their title were made to rest upon the existence of that necessity."[1]

In some of the states, however, the statute prescribes distinctly the amount of property corporations may acquire, and expressly prohibits the purchasing or holding in excess of the specified amount. And sometimes the kinds of property and the uses to which it shall be devoted are also specified. The rights of the parties to a transaction within the prohibition of such statute would depend upon circumstances more fully considered elsewhere.[2]

§ **207. Purchase and sale includes a holding.**—When a corporation is prohibited from holding land, it cannot buy and sell, for every purchase and sale by it involves a holding by it, and its incapacity renders the conveyance defective for lack of a competent grantee.[3]

But the incapacity to purchase resulting from a prohibition foundedupon the policy of preventing accumulations of property in the hands of corporations will not be inferred where the purpose of the corporation in making the purchase was to make sale of the property and apply the proceeds to the accomplishment of legitimate objects.[4]

Thus where a bank authorized to purchase and hold

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[1] Natoma Water & Mining Co. v. Clarkin, 14 Cal. 544; Russell v. T. & P. Ry. Co., 68 Tex. 646; Hamsher v. Hamsher (Ill.), 23 N. E. 1123; Case v. Kelly, 133 U. S. 21; The Bank v. Paiteaux, 3 Rand. 136. This rule applies alike to *de facto* and *de jure* corporations. E. Norway Lake, etc., Church v. Froislie (Minn.), 35 N. W. 260 ; Doyle v. Land, etc. Co., 46 F. 709.

[2] Infra, Ch. XXVII.

[3] Bank of Mich. v. Niles, 1 Doug. Mich. 401.

[4] Baird v. Bank of Washington, 11 Searg. & R. 411.

such lands and tenements, lots and convenient buildings and improvements thereon as should be necessary and proper for the carrying on of the business of the bank, and should be actually occupied for that purpose it was held that a grantee of land purchased by the bank in a distant part of the state and sold to him held the same by an indefeasible title against all except the state.[1]

§ 208. **Estate, title and tenure.**—A corporation may take a fee without mention of its successors or use of any equivalent words. And though limited in its duration, it may purchase, hold and convey a fee in like manner and with like effect as individuals.[2] It may hold by any title not inconsistent with its legal character and capacity. It may be tenant or tenant in common. But it cannot hold by joint tenancy; for the right of survivorship is an incident of such tenure. A corporation never dies, and the natural person in the joint tenancy would not enjoy the benefit of survivorship. For a similar reason, it cannot be a joint tenant with another corporation. There could not be in that case—in legal theory—any possibility of survivorship by either party.[3]

[1] Leazure v. Hillegas, 7 Searg. & R. 313.

[2] Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y. (2 Kernan) 121; City of Wilkesbarre v. Wyoming Hist. & Geolog. Soc., 26 W. N. C. 297; 19 A. 809; Herzog v. New York El. R. Co., 14 N. Y. S. 296; Asheville Division No. 15 v. Ashton, 92 N. C. 578; State v. Rives, 5 Ired. 297. See School Dist. No. 5 v. Everett, 52 Mich. 314; People v. Mauran, 5 Denio, N. Y. 389. A conveyance to trustees for a charitable use, and their successors in office, forever, passes a fee without words of inheritance. In re Sellers Chapel Meth. Church, (Pa.) 21 A. 145; App. of Redman, Id. When a grant of right of way to a company has been executed in anticipation of and as an inducement to its organization, the company may receive such grant, and, after its organization, ratify and make it obligatory on the grantor. Bravard v. Cincinnati, H. & I. R. Co., 115 Ind. 474; 17 N. E. 183.

[3] Where a city in connection with the county of which it formed a part purchased a theatre to be used for city and county purposes, each to own an undivided one half interest, and an action was brought by the taxpayers to enjoin

Nothing is more common than for two or more corporations to purchase or lease buildings or lands and hold them for business purposes as tenants in common, for instance, railroad companies of depots, ferry landings, and warehouses ; landings and wharves by steamship and other navigation companies, and places of business by insurance and trading companies. They frequently become tenants in common of personal property. Insurance companies may own pilot boats in common, and canal companies may be tenants in common of locks, canal boats and other property subserving their mutual interest.[1]

§ 209. **Where tenancy in common results.**—It is a well established rule applicable to all grants and devices, that if a grant should be made to persons or corporations implying in its terms a joint tenancy, but such an estate could not vest for the reason that some of the requisite unities were wanting, the result would be the creation of a tenancy in common. Tenancy in common was the original condition of the largest class of corpor-

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the city from making payment of its portion of the purchase money therefor on the ground that its action was both inexpedient and illegal, it was held that the two municipal corporations had power to purchase the property and hold it as tenants in common but not as joint tenants. De Witt v. San Francisco, 2 Cal. 289. Wells, J., delivering the opinion, said:—"Two corporations cannot hold as joint tenants because two of the essential unities are wanting—namely, the same capacity and title. Nor can they hold as joint tenants for another reason—being each perpetual there can be no survivorship between them, and this, as we have seen, is the distinguishing incident of this estate. Nor can a corporation hold lands as a joint tenant with a natural person, for there is no reciprocity of survivorship between them. But a tenancy in common requires for its existence but one unity, namely, that of possession. . . . . The books and cases do not afford any instance in which the right of holding lands as tenants in common either with each other or with natural persons is denied to corporations. Not one of the reasons to work a want of capacity to hold as joint tenants would prevent their holding as tenants in common for this estate requires but one unity, that of possession."

[1] 1 Kyd on Corp. 108; 7 Wend. 412, holding that corporations might be tenants in common in personalty but not deciding as to real estate, because the question was not before the court.

ations known to the common law; and their common possession was never severed until the original position produced inconveniences.[1]

The title to land acquired by a corporation is vested in the corporate entity itself and not in the members. The latter are not tenants in common and cannot even by joint and unanimous deed convey the legal title. One who holds all the stock is not competent to convey the title of the corporation in his own name.[2] The mere incorporation of tenants in common does not *ipso facto* vest in the corporation formed by them, the title to their estate. There must be a conveyance by proper deeds from the individuals to the corporation.[3] But if a conveyance is made to a corporation aggregate for their own lives, this is no estate for life but a fee simple, for they and their successors may continue to exist as a corporation forever.[4]

If, in such case, the corporation should have been dissolved at common law, the land would have reverted to the grantor or his heirs; but the corporation could have defeated a reverter by alienation in fee.[5] Lands conveyed to capital stock corporations for valuable consideration, to not revert to the vendor on dissolution. They are sold and the proceeds applied to the payment of creditors' claims if required for that purpose, and if not needed distributed to the stockholders.[6] No formal acceptance of a grant on the part of a corporation is required. Grants made to a corporation are presumed to be mutually beneficial to it and the grantor.

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[1] 1 Kyd on Corp. 108.

[2] Supra, § 5.

[3] Manahan v. Varnum, 11 Gray, Mass. 405; Seffingwell v. Elliott, 8 Pick. (Mass.) 451. See Bangor House Proprietary v. Hinckley, 12 Me. 385; Holland v. Cruft, 3 Gray, 162; Contra, Second Cong. Ch. Soc. v. Waring, 24 Pick. 304.

[4] Bac. Abr. Tit. Corporations, etc. See First Baptist Soc. v. Hazen, 100 Mass. 332; School Dist. v. Everett, 52 Mich. 314.

[5] Preston on Estates, 50, 250.

[6] Infra, § 1019.

§ 210. **Foreign corporations as landowners.**—On a question whether a foreign corporation is entitled by its charter to hold land in a particular state, the court will give its own construction to the charter and will be governed by the decision of the courts of the state under whose laws the corporation was created only so far as the reasons upon which they were founded entitle them to consideration.[1] But a state may place whatever restrictions it pleases upon the power of foreign corporations to hold lands, or may prohibit such holding entirely.[2] And where a corporation is prohibited from owning land directly in a state, it cannot exercise ownership indirectly as by obtaining a majority of the stock of a domestic corporation.[3] But a corporate deed in a chain of title though executed by a foreign corporation will be presumed to be valid though made by a foreign corporation.[4]

If the charter of a foreign corporation does not permit it to acquire real estate by ordinary methods, it cannot take it by devise in another state.[5] But where the laws of the state where a devise to a foreign corporation is made allow it, it is valid notwithstanding a prohibition in its charter or in the laws of the state of its creation.[6]

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1 Boyce v. City of St. Louis, 29 Barb. 650; Nicholson v. Leavitt, 4 Sandf. 276; White v. Howard, 38 Conn. 342; Com. v. N. Y. L. E. & W. R. Co., 114; Pa. St. 340; 1 Ry. & Corp. L. J. 108; 7 A. 756.

2 It was held that statutes authorizing railroads to take land for their right of way do not apply to foreign corporations. Holbert v. St. K. C. & N. R. Co., 45 Ia. 23. An educational institution chartered in another state not having a capital stock was held not prohibited from owning real estate in Illinois within the terms of sec. 26 Ill. corporation act of 1872. Santa Clara Fem. Acad. v. Sullivan, 116 Ill. 375; 6 N. E. 183.

3 Com. v. N. Y. L. E. & W. R. Co., 114 Pa. St. 340.

4 Tarpey v. Deseret Salt Co., (Utah) 17 P. 651.

5 Boyce v. St. Louis, 29 Barb. 650; Starkweather v. Am. Bible Soc., 72 Ill. 50.

6 Am. Bible Soc. v. Marshall, 15 O. St. 537. Thompson v. Swoope, 24 Pa. St. 474; Sherwood v. Am. Bible Soc., 4 Abb. App. Cas. 227. And though duly authorized by its charter, if contrary to law of the state where made, the devise

§ 211. Capacity to hold as trustee. Title as cestui que trust.—It seems that in England a corporation cannot assume to designate an agent to perform the duties of an executor or administrator with the will annexed under an appointment as such.[1] But with respect to trusts which are not strictly matters of personal confidence, the former rule has been relaxed and corporations may now take property in trust for others where they might take it directly and absolutely for their own purposes. "Where a corporation has legal capacity to take real and personal estate, then it may take and hold it upon trust in the same manner and to the same extent as a private individual may do."[2]

If property be granted to a corporation in trust partly for itself and partly for another corporation, it may hold it and execute the trust.[3] And one incorporated mission society may take and hold property in trust for another.[4]

It was settled by the early decisions in this country, that corporations might execute trusts of a religious and charitable nature if consistent with the objects of their creation.[5] And equity will not allow a trust to

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is void. See United States v. Fox, 94 U. S. 315, holding a devise of land to the government of the United States to be void.

1 Georgetown College v. Brown, 34 Md. 450; Matter of Thompson, 33 Barb. 334.

2 Vidal v. Girard's Exrs., 2 How. 127, 187, per Justice Story. A bequest of all the residue of the testator's estate to trustees, to be converted into personalty, and the income derived therefrom to be paid to the board of water commissioners of Detroit, or their successors, to be used by them in beautifying and improving the grounds whereon the water works are situated, and for the maintenance of a library, is valid; being a trust of which the subject, the beneficiaries, and the purpose are clearly defined, and the beneficiaries having been expressly authorized by the legislature to accept and expend the fund arising thence. Penny v. Croul, 76 Mich. 431; 43 N. W. 649.

3 Matter of Howe, 1 Paige, 214. See In re Tweed, 12 N. Y. S. 642.

4 Sheldon v. Chappel, 47 Hun, 59.

5 Robertson v. Bullions, 11 N. Y. 243; Chaplin v. School Dist., etc., 35 N. H. 445; Phillips Academy v. King, 12 Mass. 546. A township being a distinct municipal corporation, with power to receive and expend funds coming into its possession, for school purposes, a devise to it for the support of the common

fail merely because a corporation appointed as trustee is incompetent from lack of legal capacity to execute the trust. The court will appoint a proper trustee to carry it out.[1]

§ 212. **Must have capacity to execute the trust.**—Notwithstanding the general rule that whoever is capable of taking the legal title or beneficial interest in property may take the same in trust for others, it does not follow that such party is capable of performing or executing the trust. The ability or competency to execute the trust is the real test in determining whether a corporation may take. If, for instance, the law does not allow aliens and non-residents to become trustees, the prohibition would apply to foreign corporations, though the latter be authorized to purchase real estate for its necessary uses. The general rule of qualification and capacity of corporations as trustees applies and

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schools is germane to the purpose of its creation, and is not void for want of capacity in the devisee to hold. Skinner v. Harrison, 116 Ind. 139; 18 N. E. 529.

The charter of the North American Relief Society for the Indigent Jews in Jerusalem contains by implication power to ameliorate their condition by the contribution of money for the purposes of education, and hence it can take money left it by will for that purpose. Riker v. Leo, 1 N. Y. S. 128.

A legacy of $30,000 "to the trustees of Bloomfield Academy to be appropriated at their discretion in founding a free public library in the town of Showhegan," is vested absolutely in the donee. Dascomb v. Marston, (Me.) 13 A. 888.

Where land was given an association to establish a school, and the association built on it, and afterwards obtained a charter, which was allowed to lapse, it was held that the obtaining of the charter put the association in abeyance, and at its expiration the land revested in the members of the association, and did not revert to the donor. Bates v. Palmetto Soc., (S. C.) 6 S. E. 327.

Testator gave legacies to named educational and charitable institutions, and provided for the accumulation of a trust fund, from the income of which one-quarter should go to "educational institutions similar to those mentioned," and one-quarter to "charitable institutions similar to those mentioned." Held, that it is for the trustee to decide to which of similar institutions the fund should be distributed, and the proportions to be given to each. Rhode Island Hospital Trust Co. v. Olney, (R. I.) 13 A. 118.

[1] Infra, Ch. 37. Story Eq. Jur., secs. 98, 976; McCarter v. Orphan Asylum Soc., 9 Cow. 437; Crocheron v. Jaques, 3 Edw. 207; Bundy v. Bundy, 28 N. Y. 410; Perry on Trusts, 38.

determines who and in what cases they may be *cestuis que trust* and a corporation may be a beneficiary in a trust estate where it could legally acquire and hold the legal title.

A simple bequest of money to be paid to a foreign corporation is valid even if the law of the state where the will is made forbids the execution of such a trust as that, for which the corporation is created.[1]

They cannot evade statutory limitations upon their right to take the legal title to lands by taking the legal title to trustees and the beneficial interest to themselves.[2]

§ **213. A liberal rule with respect to charitable trusts.**— But to this rule there is an important exception in favor of charitable trusts. A limitation of one charity upon another is not an infringement of the rule against perpetuities.[3] In these the *cestuis que trust* are not and need not be capable of taking the legal title, as when property is given in trust for the poor of a parish or for the education of youth, or for pious uses, or for any charitable purpose. The beneficiaries are generally unknown, uncertain, changing and incapable of taking or dealing with the legal title. Such trusts are valid in equity; and courts of equity will administer them and protect the rights of the *cestuis que trust.*[4]

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[1] Trustees Presby. Ch. v. Guthrie, 6 L. R. An. 321; 86 Va. 125; Bank of Augusta v. Earle, 13 Pet. 521; Cowell v. Colo. Spgs. Co., 100 U. S. 55.

[2] Hill on Trustees, 52; Lewin on Trusts, 36.

[3] Storrs Agr. School v. Whitney, 54 Conn. 342; 8 A. 141; so a conveyance of land to the trustee of an incorporated religious society, to be used for the erection of a church building, does not violate the statutes against suspension of the power of alienation, for the reason that such trustees are within the meaning of the statutes, "persons in being, by whom an absolute fee in possession" could at any time be conveyed through the agency of the circuit court, as prescribed in the statutes. Fadness v. Braunborg, 73 Wis. 257.

[4] "It is immaterial how uncertain, indefinite, and vague the *cestuis que trust* or final beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. In

§ 214. How affected by doctrine of cy pres.—The doctrine of *cy pres* has an important bearing upon all be-

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other words, it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be. Uncertainty as to the individual beneficiaries is characteristic of a charitable use." Beckwith v. St. Phillips Parish, 69 Ga. 564; Miller v. Atchinson, 63 N. Car. 537. See also McLain v. School Directors, 51 Pa. St. 196. In order that a bequest to a town for the purpose of investing the principal and applying the income to a specific object may take effect as an absolute gift to the town, the gift must be made for some one or all of the purposes for which the town was incorporated; and where it is under no legal liability to support persons who do not come within the statutory definition of poor persons, a bequest "for the support of the poor of the town" cannot take effect as an absolute gift to the town. Reversing 8 N. Y. S. 772. RUGER, C. J., and FINCH and GRAY, JJ., dissenting, Fosdick v. Town of Hempstead (N. Y.) 26 N. E. 801; State v. Griffith, 2 Del. Ch. 392.

A bequest "to the Am. Bible Soc. . . . to be used by the said society for the promulgation of the Holy Bible," is not void as a gift in trust, without a definite or ascertainable beneficiary capable of enforcing the trust, since the gift was limited to the precise use for which the society was incorporated. In re Look, 54 Hun, 635; 7 N. Y. S. 298. See also Wetmore v. N. Y. Inst. for the Blind, 18 N. Y. St. R. 732; 3 N. Y. S. 179; Riker v. Leo, 115 N. Y. 93; 21 N. E. 719; Rev. St. Wis. 1849, c. 57, sec. 11, subd. 5, provided that "express trusts may be created for . . . . . the beneficial interest of any person or persons, when such trust is fully expressed," etc. Held, that a conveyance to the trustees of an incorporated religious society, for the use of the "members" sufficiently designated the beneficiaries. Fadness v. Braunborg, 73 Wis. 257; 41 N. W. 84.

A devise to a lodge of Odd Fellows "for the benefit of the widows and orphans," is for the widows and orphans of deceased members of that lodge, and is sufficiently definite to be sustained as a charity. Heiskell v. Chickasaw Lodge, 3 Pickle, Tenn. 668; 11 S. W. 825; Wood v. Hammond, (R. I.) 17 A. 324; App. of Goodrich, 57 Conn. 275; 18 A. 49.

A bequest to the "trustees and managers of the Phil. Water Works" for the benefit of the corporation is invalid, such a bequest not being for a public charity, and there being no corporation of that name, as the water works are owned and managed by the city of Phil., which will not be presumed to be the object of the bounty. Doughten v. Vandever, 5 Del. Ch. 51. A legacy to the "Fund for Disabled Ministers of the Presby. Ch." will go to the "Presby. Board of Relief for Disabled Ministers and the Widows and Orphans of Deceased Ministers," where it appears that the latter title is the name of the only corporation engaged in relieving Presby. Ministers; that testatrix knew and approved of this corporation; and that there was no such corporation or society as that named in the will. Woman's Un. Miss. Soc. v. Mead, 131 Ill. 33; 23 N. E. 603.

A testatrix bequeathed legacies to the "trustees of the Orphans' Asylum of Phil. in the State of Penn.," the "trustees of the Widows' Asylum" of the same place, and to the "trustees of the Marine Soc." of the same city and state, for the benefit of those various institutions. Held, that these bequests were for

quests to corporations for charitable uses where any uncertainty exists as to the intended beneficiary.[1]

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public charities, and that the "Orphan Soc. of Phil." the "Indigent Widows' and Single Women's Soc." and the "Penn. Seaman's Friend Soc." answered with sufficient certainty the objects designated in the will and would take under it. Doughten v. Vandever, 5 Del. Ch. 51. See also Trustees of the General Assembly of The Presby. Ch. v. Guthrie, 86 Va. 125; 10 S. E. 318. Compare Stratton v. Physio-Medical College, 149 Mass. 505; 21 N. E. 874; In re Fuller's Will, 75 Wis. 431; 44 N. W. 304; Dulany v. Middleton, (Md.) 19 A. 146; People v. Simonson, 28 N. Y. St. Rep. 97; 7 N. Y. S. 861.

[1] A bequest to such charitable institutions in the city of St. Louis as "my executor shall deem worthy" held to be sufficiently definite. Howe v. Wilson, 91 Mo. 45; 3 S. W. 390. See also Hunt v. Fowler, 121 Ill. 269; 12 N. E. 331.

A grant of land "upon which shall be erected a college free from all sectional or political influence" is in its nature a charitable trust, and as such it is no objection that the beneficiaries are uncertain or unknown. Raley v. County of Umatilla, 15 Or. 172; 13 P. 890.

A bequest of one half of the revenue of an estate to the Presby. Committee of Publication at Richmond, Va., is a valid bequest not void for uncertainty, and was intended to be a bequest to the trustee of the Presby. Committee of Publication, which by its charter had a legal capacity to take, and is entitled to take the same. Wilson v. Perry (W. Va.), 1 S. E. 302. But charitable bequests of $500 to enclose the Mount Pleasant Church and graveyard, $4,000 to purchase a parsonage for Mt. Pleasant Church, $250 for the Presby. Sunday School at Union, $250 for the Sunday School at Centerville, $250 for the Sunday School at Fairview School House, $300 for the Home Missions of the Presby. Ch. and the remaining half of the residue of said estate to purchase a parsonage at Union, are uncertain as to the beneficiaries, and therefore void. Wilson v. Perry, 29 W. Va. 169; 1 S. E. 302. See also Vt. Bap. State Conv. v. Ladd's Estate, 58 Vt. 95; 4 A. 634; King v. Grant, 55 Conn. 156; 10 A. 505.

A testator bequeathed a sum of money to a certain church the income thereof "to be applied to the Sunday School belonging to or attached to said church." The church was a corporate body, but the Sunday School was not. The Sunday School having been shown to be an integral part of the church organization, there was not such uncertainty as to, and want of legal identification of, the object to be benefited as would render the bequest void. Eutaw Place Bap. Ch. of Balt. City v. Shively, 67 Md. 493; 10 A. 244.

A bequest to the churches of a certain denomination in a city for the care of their poor does not create and perpetuate a fund not recognized by law, but is an ordinary bequest for pious uses recognized by the La. Civ. Code and favored by the courts of that state. Succession of Auch, 39 La. Ann. 1043; 3 So. 227.

Where a testator bequeathed a portion of his estate "to the poor of the city of Green Bay," and there were no city paupers nor a poor fund in the city of Green Bay at the time of the testator's death, it was held that the bequest was void for uncertain. In re Hoffen's Estate, (Wis.) 36 N. W. 407.

A will which provided: "I do will and bequeath to the Meth. Epis. Ch. South, to be applied to foreign missions, all my property, real and personal, after the payment of my just debts, for their use and benefit exclusively," was held sufficient indication of testator's purpose. Kinney v. Kinney's Ex'r, 86 Ky. 610; 6 S. W. 593.

It is well settled that in trusts created for other than charitable purposes for the benefit of a natural person, it is not always necessary that the *cestui que trust* should be in existence at the time of its creation.[1] And a devise for a charitable use to churchwardens, although not a corporation capable in law of holding and transmitting property, will be sustained.[2]

So the devise may be made to a corporation to be organized after the death of the donor, or to certain officers for their successors in office ; or if they are incapable of executing the trust then to a corporation to be formed for the purpose.[4]

A discretion vested in executors and trustees to bestow upon a charitable corporation directed by the will to be organized, the whole of the residuary estate, or such part as they may deem expedient, does not render the gift invalid for uncertainty. Tilden v. Green, 18 N. Y. S. Rep. 752; 2 N. Y. S. 584.

The residuary clause of a will was—"I devise the remainder of my estate to the Old Ladies' Home, at present near Rincon Hill at St. Mary's Hospital." It was shown that a corporation named the "Sisters of Mercy" conducted an establishment generally known as "St. Mary's Hospital," of which one department was called "Old Ladies' Home," and that there was no other Old Ladies' Home in the vicinity of Ricon Hill. It was held that testatrix meant to make such corporation her residuary legatee, and that the bequest was valid. In re Gibson's Estate, 75 Cal. 329; 17 P. 438.

1 Ashhurst v. Given, 5 Watts & S., Pa. 329; Carson v. Carson, 1 Wins. N. Car. 24.

2 Atty.-Gen. v. Oglander, 3 Bro. Ch. 166; Atty.-Gen. v. Green, 2 Bro. Ch. 492; Atty.-Gen. v. Boultbee, 2 Ves. Jr. 380; Frier v. Peacock, Finch, 245; Duke, 355; Atty.-Gen. v. Wansay, 15 Ves. 232; Burrill v. Boardman, 43 N. Y. 254.

3 Russel v. Allen, 107 U. S. 163.

4 Seda v. Huble, 75 Ia. 429; 39 N. W. 685; Dascomb v. Marston, 80 Me. 223; 13 A. 888. See also Weeks v. Hobson, 150 Mass. 377; 23 N. E. 215; Field v. Drew Theological Seminary, 41 F. 371; Sheldon v. Chappell, 47 Hun. 59; Penn. v. Wadhams, (Or.) 25 P. 720; Inglis v. Sailors' Snug Harbor, 3 Pet. 99; White v. White, 1 Bro. Ch. 12; Atty.-Gen. v. Downing, Amb. 550; Tilden v. Green, 18 N. Y. St. Rep. 752; 2 N. Y. S. 584; Fadness v. Braunborg, 73 Wis. 257; Atty.-Gen. v. Bayer, 3 Ves. 714.

A bequest to the trustees of a church or unincorporated religious society is void in West Va. and lapse of time and acquiescence of the testator's residuary legatee in such bequest do not aid it. Mong. v. Roush, 29 W. Va. 119; 11 S. E. 906.

Foreign corporations may take bequests of charities under a will made in West Va. when and to the extent authorized, by their charters. University v. Tucker, 31 W. Va. 621; 8 S. E. 410.

With respect to the capacity for taking and holding and the title acquired, it is immaterial as to the means of acquisition of property whether by devise, bequest, gift, *inter vivos*, gift *causa mortis*, or investment of corporate funds or by the exercise of eminent domain.

§ **215. Execution of charitable uses.**—In order to properly discuss the functions and duties of corporations in the administration of charitable uses, it becomes necessary to define the term "charity." In its restricted sense, it means relief or alms to the poor; but a charity in a legal sense may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons,—either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." [1]

A will containing a devise of land to a religious society by the words, "At the death of my wife, I give and devise," etc., provided that the land devised should be used as a parsonage by the society, and that when the society shall cease to use it as such it should revert to the testator's heirs. It was held, that the devise did not vest till the death of testator's wife, and that the society, having been incorporated during her life, was competent to take under the devise, although not incorporated at the time of testator's death. Longheed v. Dykeman's Bap. Ch. & Soc. 12 N. Y. S. 207.

When subscriptions for the benefit of a business corporation to be organized in the future are made payable to a designated agent he becomes trustee of an express trust, and may enforce such subscriptions by suit in his own name according to their terms. West v. Crawford, 80 Cal. 20.

[1] Jackson v. Phillips, 14 Allen, 556, per Justice GREY. A trust for the purpose of public religious worship and other charitable uses is one of which the courts will take cognizance and assume control for the purpose of preventing its abuse, perversion or destruction. Mannix v. Purcell, 46 Ohio St. 102; 19 N. E. 572; Succession of Auch., 39 La. Ann. 1043; Seda v. Huble, 75 Ia. 429; Hutchin's Ex'r v. George, 44 N. J. Eq. 124; Kinney v. Kinney's Ex'r, 86 Ky. 610; 6 S. W. 593.

The importance attached to charity by the English courts of chancery arises from the statute of Elizabeth under which those purposes are considered charitable which are enumerated in the statute or which by analogy are deemed within its spirit or intendment.[1]

§ 216. Administration of charities by corporations.—By reason of their continuity of existence and immunity from those accidents which are liable to terminate the trust or interrupt its enjoyment when the trustees are natural persons, corporations are the safest and most convenient mediums through which to effectuate the intentions of donors of funds devoted to general charity. Owing to these superior facilities the trustees of a charity sometimes have themselves incorporated in order to carry out the intention of the donor with more convenience. There is nothing illegal in their doing so. True, it is a delegation of the trust which ordinarily is not allowable; but such charities being matters of public concern, to a certain extent, the legislature has power to direct their administration and to make all needful provisions and rules for the preservation and application of the funds with the consent of those in whom is vested the legal title. But it may not alter the uses to which they have been devoted or establish any changes which could not, by a fair construction, have been contemplated by the donor.

An unincorporated institution organized, administered, and maintained by a municipal corporation, and known as "The Insane Asylum," may be the object of a charitable bequest. Succession of Vance, 39 La. Ann. 371; 2 So. 54.

A gift of real estate in Missouri. to the Mo. Historical Soc. and Academy of Science of St. Louis, being for the promotion of science, education and the diffusion of useful knowledge, is valid as a charity, though not so denominated in the deed. Mo. His. Soc. v. Academy of Science, 94 Mo. 459; 8 S. W. 346.

[1] Tudor Char. Uses, 2nd Ed. 4; Morice v. Bishop of Durham, 9 Ves. 405.

Penn. Laws, Act of Apr. 26, 1855, declares bequests to charities void when testator dies within one calendar month after making his will. Craig v. Libby, (Pa.) 9 A. 171. See also Shields v. McAuley, 37 F. 302. Compare Porter v. Carolin, 50 Hun, 603; 2 N. Y. S. 791. Laws N. Y. 1848; Ch. 319, renders in-

The trustees have such vested rights under the gift of the donor and the act of incorporation, that they cannot be controlled or interfered with by subsequent special legislation.[1]

§ 217. **Corporate powers with respect to trusts cannot be enlarged.**—A corporation engaged in the execution of a trust cannot be enlarged by an addition to its objects and still retain authority over the original charity. But where a municipal corporation is the devisee of an estate in trust for charitable uses, its right to hold property devised to it is not destroyed by a change of its name or an enlargement of its area or an increase in the number of its incorporators, the identity of the corporation remaining the same.[2]

Funds devoted to charitable relief and education of indigent classes cannot be diverted by the trustees charged with the execution of the trust to general educational purposes. Thus, where a fund was devised in 1815 with directions to the trustees to invest a portion

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valid bequests to charitable institutions under a will made within two months of testator's death. Bruenahan v. Manhattan Col., 53 Hun, 48. See also In re Kavanagh's Will, 53 Hun, 1; Cole v. Frost, 51 Hun, 578.

Under a statute which provided that no bequest of more than one half of an estate to charitable institutions should be valid, it was held that when a testator devised all of his estate to his wife absolutely during her life and with remainder over after her death, and the payment of her just debts to two religious societies, and the wife died, leaving the entire principal of the estate unused, that the remainders over were valid only to the extent of one half of the estate. McKeown v. Officer, 6 N. Y. S. 201. See also In re Stile's Estate, 3 N. Y. S. 137. Compare Kine v. Becker, 82 Ga. 563; 9 S. E. 828.

1 Dartmouth College v. Woodward, 4 Wheat. 518; St. John's College v. State, 15 Md. 330; Brown v. Hummel, 6 Pa. 86; State v. Adams, 4 Mo. 570.

2 Girard v. Philadelphia, 8 Wall. 1. In 1769, M. bequeathed his estate in trust to educate poor children. This trust remained in abeyance until 1811, when the legislature incorporated the Orange Humane Soc. to administer it, which it did for 60 years. Act Va., March 27, 1876, assumed to repeal said act of 1811, and to transfer said fund and corporate franchises to Orange County school board. It was held a valid act, because said fund had been dedicated to "public" uses, and said "society" was a "public" corporation. Lewis, J. dissenting. Wambersie v. Orange Humane Society, 84 Va. 446; 5 S. E. 25.

of the fund, and apply the proceeds of the investment for the use and support of a "poor school" or "institution" for the benefit of poor children in the town of Zanesville, Ohio, it was held that any permanent appropriation of the proceeds of such fund to aid the public schools of said city, thus lightening the taxes assessed upon property, would be a perversion of the fund from the legitimate objects of the donation, and the court directed a discontinuance of such appropriation.[1]

But an obvious distinction exists between the objects of a donor's bounty and the means of giving them its benefits; and a court of equity may direct such alterations in the methods of relieving such objects as their altered conditions may require. If a corporation in charge of a trust does not possess adequate powers to meet such changed condition, the state may confer upon it the requisite additional powers without divesting it of the legal title. "It cannot admit of a doubt, that where there is a valid devise to a corporation in trust for charitable purposes unaffected by any question as to its validity . . . . . the sovereign may interfere to enforce the execution of the trusts either by changing the administrator if the corporation be dissolved, or if not by modifying or enlarging its franchises provided the trust be not perverted and no wrong done to the beneficiaries."[2]

§ 218. **Visitorial power over the trust.**—Over the trust fund given to corporations to be administered for charitable purposes or given to trustees, the donor of the trust usually reserves in the instrument by which the trust is created a limited supervision. But even in the

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[1] McIntire's Admin. v. Zanesville, 17 O. St. 352.

[2] Girard v. Phil., 7 Wall. 1, 14, per Justice GRIER.

absence of such reservation on the institution of such a charity, visitorial jurisdiction arises of common right in England to the founder and his heirs, or to those whom the founder has substituted in place of himself and his heirs.[1]

The common law right of visitation was recognized in England as early as the beginning of the reign of Edward the Third.[2] It was frequently and probably first exercised in the case of religious corporations; but it does not exist with respect to them in this country. Though the charities administered by religious denominations, are frequently of a public nature, the corporations themselves are reckoned private so far that the government has no more authority to control the disposition of their ordinary funds than those of private moneyed corporations. The abuse of a charitable trust by a religious corporation may be redressed at the suit of any party in interest by a court of chancery.

§ 219. **Modern view of visitorial power.**—The classes of corporations which may accept and execute charitable trusts as well as the conditions and limitations upon the right and their duties therein are regulated by statute in most of the states. These are generally intended to prevent the evils resulting from accumulations in the hands of private persons with opportunities thus afforded for abuses of the trust in disregard of the intentions of donors; to in a measure restrain testators from disinheriting legal heirs by giving too free vent to fanatical zeal or religious enthusiasm, "in those hours of physical and mental lassitude which often precede dissolution," and to vest the visitorial power in the courts and public authorities rather than in private parties. Their policy

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1 Perry on Trusts, 742; Eden v. Foster, 2 P. Wms. 326; Atty.-Gen. v. Gaunt, 3 Swanst. 148.

2 Year Books, 3, fol. 69, 70.

is similar to that which led to the enactment of the English statute of uses during the reign of Queen Elizabeth.[1]

Various reasons have been assigned for the enactment of that statute. One of the reasons probably was that the power and influence of the ecclesiastical bodies charged with the administration of temporalities overawed the proper authorities, and by this means escaped all checks and enjoyed immunity from redress for breaches of trust and neglect of duty to the charitable objects. And one object for vesting jurisdiction in the High Court of Chancery doubtless was to remove the visitorial power beyond the reach of corrupt influence and intimidation, which neither the founders themselves, their heirs, nor inferior ecclesiastical tribunals were capable of resisting.

These dangers, while they exist in this country to a limited extent, are much less to be feared. But the courts of ordinary jurisdiction are given ample power and provided with adequate remedies to reach and redress every case of abuse, and are fully capable of exercising the visitorial duties.[2]

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1 After reciting the uses to which property of every kind had been "given, limited, appointed and assigned by the Queen and other well disposed persons for some or other of the purposes" therein specified (enumerating them), and that the lands and effects so appropriated had not been duly employed, that statute proceeds to vest visitorial power with respect to the execution of the funds so devoted in such bishops and other church dignitaries and other persons as should be appointed and commissioned by the Lord Chancellor, Lord Keeper of the Great Seal, etc. 43 Eliz. Ch. 4; Boyle pp. 1–12.

2 It would not serve any useful purpose, even if it were practicable or germane to our subject, to notice the statutory provisions of the several states. Charitable trusts, however, subject to the directions and limitations provided are usually favored in several respects. The provisions designed to prevent perpetuities do not as a general rule, apply to them as in the case of other trusts. The doctrine of *cy pres* which is still recognized to a limited extent owes its invention to a disposition of courts to give effect to charitable bequests under circumstances where ordinary trusts would fail for uncertainty. Charitable bequests are not, however, favored or even recognized in every state in the Union. Such dispositions of property by testators were not until recently recognized as valid in Md. or Va.

§ **220. Vested in courts of equity.**—Courts of equity in the various states, where not prohibited by statute, exercise an original inherent jurisdiction over charities

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The decision in Protest. Epis. Ed. Soc. v. Churchman, 80 Va. 718, was the last of a long line of decisions in Va. beginning with Gallego v. Atty.-Gen., 3 Leigh, 450, denying the validity under the constitution and statutes of Va. of bequests to religious and charitable uses. A different view has since been taken in two important well considered cases. Bequests to foreign incorporated missionary societies were upheld in Missionary Soc. v. Calvert, 32 Gratt. 357, and in Trustees, etc., v. Guthrie, 86 Va. 125; 6 L. R. An. 321. In both cases it was held that charities for religious purposes are not against the constitution or laws or the policy of the law in that state. They are valid in Cal., N. Y., Maine, Vermont, Mass., Penn., Kentucky, North Car., Georgia, Indiana and most of the other states. Section 1313. The Cal. Civ. Code contains important restrictions upon the devotions of property to charitable uses. It would be difficult to synopsize it. It reads as follows:—

"Sec. 1313. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death, such devise or legacy, and each of them, shall be valid; provided, that no such devises or bequests shall be made so as to reduce the aggregate thereof to one third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

A subsequent act passed in 1881 vests important discretionary powers in county and city authorities in the matter of accepting or rejecting bequests to public charities made to them administering the same and disposing of income and increase thereof. Following Sec. 1313 of the Civ. Code. The above section clearly recognizes the validity of bequests to charitable and benevolent societies and corporations subject to the limitations therein contained. See Robinson's Est., 63 Cal. 620. The jurisdiction of courts of equity in Cal. to establish and enforce charities when trustees competent to take the estate are named and the class to be benefitted and the designated beneficiaries are capable of ascertainment is derived from the common law independently of the statute of Elizabeth. Estate of Hinckley, 58 Cal. 457. Under that statute devises to corporations for charitable uses were at first deemed void at law; but were sustained in equity, not as conveyances to the corporation, but subject to and clothed with the use designated by the testator.

Kyd on Corp. 72; Gilbert, Uses and Trusts, 5, 170; Jeremy's Eq. Jur., book 1, p. 19; Atty.-Gen. v. Stanford, 2 Swanst. 594; Green v. Rutheforth, 1 Ves. Sen. 468; Coventry v. Atty.-Gen. 2, Bro. P. C. 235; Trustees of Phillips Acad. v. King, 12 Mass. 566. The whole subject of charitable bequests was reviewed, and the constitutional and statutory provisions of Cal. bearing upon the question of common law jurisdiction in the administration of charities, in connection with their provisions against perpetuities, were discussed and construed by McKinstry, J., in the course of an elaborate opinion in Hinckley, Estate of, 58 Cal. 457, 481. Many decisions in England and in this country in both federal and state courts were considered.

and apply to them rules of equity together with other ordinary rules applicable to charitable uses; and they do this by virtue of their inherent powers without reference to the question whether the statute of 43 Elizabeth has been technically adopted in their states.[1] The objection does not lie to a charitable bequest to an unincorporated church, that if the trustees should misuse the fund no one could call them to account.[2]

§ 221. **English decisions inapplicable.**—Most of the decisions of the English courts bearing on the question of visitorial power are inapplicable in this country. The courts possess ample powers to correct abuses by trustees and enforce the conditions imposed by the

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1 Perry on Trusts, 694; Vidal v. Girard's Ex'rs, 2 How. 127; Williams v. Williams, 4 Selden, 533; Atty.-Gen. v. Moore, 4 C. E. Green, 503; Walker v. Walker, 25 Ga. 420; Sweeney v. Sampson, 5 Ind. 465; Tappan v. Deblois, 45 Me. 122; Going v. Emery, 16 Pick. 107; Jackson v. Phillips, 14 Allen 558; Norris v. Thompson, 4 C. E. Green, 307; Williams v. Pearson. 38 Ala. 299; State v. Prewett, 20 Miss. 165; Paschall v. Acklain, 27 Tex. 173; Chambers v. St. Louis, 29 Mo. 543; Atty.-Gen. v. Wallace, 7 B. Monr. 611; Franklin v. Armfield, 2 Sneed, 305; Urmry's Ex'rs v. Wooden, 1 Ohio St. 160; Gillman v. Hamilton, 16 Ill. 225; Grimes v. Harmon, 35 Ind. 246; Burr's Ex'rs v. Smith, 7 Vt. 241; Vidal v. Phil. 2 How. 128; Ould v. Wash. Hospital, 95 U. S. 363. At the time of the decision in Bap. Ass'n v. Hart's Ex'trs., 4 Wheat 1, a different view prevailed both in this country and in England, and it was thought that courts of equity had not exercised common law jurisdiction over charitable bequests in England prior to and independent of the statute of Elizabeth. But the records published in the report of the commissioners of public records in England in 1827, 1830, 1832, disclosed about fifty cases in which courts of chancery had exercised jurisdiction in establishing, regulating, and enforcing gifts and grants to charitable uses before the statute similarly as they had done subsequently.

The opinion has since been expressed by most, if not all the great judges and chancellors of England and by the judges of the highest courts in the United States that the statute created no new law but simply a new and ancillary jurisdiction by commission to issue out of chancery to inquire whether funds devoted to charitable purposes had been misapplied. Perry on Trusts, 694, and cases cited.

2 Seda v. Huble, 75 Ia. 429; 39 N. W. 685, holding that a bequest in trust for an unincorporated Roman Catholic Church being to the persons named, who take money charged with the execution of the charitable use, it would not be material that the Catholic Church is prohibited from taking or holding any property whatever.

founders of charities. It may be doubted if such a thing as the visitorial power exists in this country in its original sense.[1]

The state, through its courts, possesses absolute control over the administration of public charities ; but unless private corporations charged with the execution of a private trust abuse their franchises, the state will not interfere. When the use to which the fund is devoted is public, the attorney-general may proceed in a court of equitable jurisdiction and invoke the same remedies for its preservation and restitution as a private suitor interested in a private trust. In the sense that the state may call all private corporations to account for abuse of their franchises, it possesses sole, supreme and visitorial power under our system.

§ 222. **Donor may make rules and conditions.**—The founder of a charity may make whatever rules and regulations for the government of the corporation which he creates to dispose of his bounty he pleases, and no matter how arbitrary and unreasonable they may appear, may exact a strict compliance. Any violation of the prescribed rules and conditions may by their terms subject the offender to any civil consequences he has seen fit to impose, which may be enforced in any court of competent jurisdiction. The time for an examination and scrutiny of these is before the trust is accepted ; afterwards, the trustee will not be heard to complain of their harshness.

The terms expressed in the grant or deed of settlement to charitable uses become by-laws of the corporation created, (formerly called statutes,) and cannot be repealed or materially altered without the consent of the founder. His visitorial power extends to the enforce-

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[1] Atty.-Gen. v. Utica Ins. Co., 2 Johns. Ch. 371.

ment of these by-laws. If they be not observed, he, or the person vested by him with the so-called visitorial power, may have his appropriate action for redress ; but the person so authorized cannot defeat the grant for a violation unless expressly given the right to resume it as for condition broken.[1]

§ 223. The rule against perpetuities not applicable to charitable bequests.—Perpetuities were in great disfavor at common law ; consequently a constitutional provision or a statute directed against them is but an express declaration of principles already recognized by courts in all common law states. Charitable devises of unlimited duration were, on the other hand, upheld at common law, and were not within the spirit of the rule against perpetuities. Therefore, without express provision to the contrary, the first proposition as well as its counterpart prevail in all those states where the English common law prevails, and statutes which limit the period during which the alienation of property may be restrained in conveyances, settlements and wills in general terms will not be held to apply to charitable bequests or conveyances to trustees for permanent charitable uses.[2] When the object of the trust is private

[1] The interest of shareholders and their right of control in corporate matters at stockholders' meetings and their right to have the business conducted according to the charter and the by-laws enacted by them may be properly called a visitorial power, and in no other sense does any such power exist with respect to corporations having a capital stock.

[2] Lewis on Perpetuities, 663; State v. Griffith, 2 Del. Ch. 399. It was held to be settled doctrine in Ala. in 1862 that the chancery court had jurisdiction by virtue of its original common law powers, without claiming prerogative powers and without the aid of the statute 43 Elizabeth, to uphold an executory bequest of money to the "Pilgrims' Rest Association" "to be loaned out by the commissioners to be appointed by said association," etc. Williams v. Pearson, 38 Ala. 299. The same view as to the power of courts of chancery in the respective states where they were decided prevailed in the following cases : Treat's App., 30 Conn. 115; Zanesville C. & M. Co. v. Zanesville, 20 O. St. 483; Grisson v. Hill, 17 Ark. 488; Atty.-Gen. v. Wallace, 7 B. Mon. 611, holding also that

the favor which the law gives to charity cannot be invoked for it so as to allow the creation of a perpetuity. Such trusts are void if they create perpetuities, while the full conception of a charitable trust includes the idea that it is or may be perpetual.[1]

§ 224. **How far the directions of the donor of funds for charitable uses are binding on the corporation.**—If a charity fund be given to an old corporation, it is not subject to the same rules and conditions as the property with which the charity was originally endowed nor will the new gift be subject to the original visitorial power unless a plain intention of the donor to that effect be either expressed or implied.[2]

If the property is given generally and no special purpose is named, the donor will be presumed to intend that the charity shall be administered and regulated by general rules of the corporation.[3] Where, however, a particular trust has been annexed to the fund donated in the hands of the corporation, the rules prescribed by the original founder of the trust will not attach to it, and the court will not treat the corporation in respect to the newly-acquired fund as an ordinary trustee or as an individual entrusted with the fund for a particular purpose.[4]

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the courts of chancery in that state possesses the powers of chancery in England, even such as are in the nature of prerogative; Miller v. Chittenden, 4 Ia. 252; Ex'rs' of Burr v. Smith, 7 Vt. 241; Paschal v. Acklin, 27 Tex. 173; Williams v. Williams, 8 N. Y. 525, though in view of subsequent decisions it is doubtful if this case is authority in that state at present. See Levy v. Levy, 33 N. Y. 97.

1 Fire Ins. Patrol Co. v. Boyd, 120 Pa. St. 624; Mifflin's App., 121 Pa. St. 205; Heiskell v. Chickasaw Lodge, 3 Pickle (Tenn.), 668; Callman v. Grace, 112 N. Y. 299.

2 Green v. Rutherforth, 1 Ves. 472; Corp. of Sons of Clergy v. Mose, 9 Sim. 610; Phillips v. Bury, 1 Ld. Raym. 5; Comp. 265; Holt, 715; 1 Show. 360; 4 Mod. 106; Skin. 447.

3 Ex parte Inge, 2 R. & M. 596; Atty.-Gen. v. Clare Hall, 3 Atk. 675; Hadley v. Hopkins, 14 Pick. 240.

4 Green v. Rutherforth, 1 Ves. 462; Corp. Sons of Clergy v. Mose, 9 Sim. 610.

§ 225. **Effect of conditions.**—If a condition be inserted in a deviso to a corporation that a certain thing shall be done and it is provided that in case of failure to perform the condition the estate shall go to an individual, the latter is not bound by the mere will and pleasure of the corporation as to the time and manner of performing the condition. It must be performed within a reasonable time according to its nature.[1]

§ 226. **Grants and devises to religious corporations.**—Equity will not discriminate against religious in favor of other charitable objects, or *vice versa.* Thus, where a church held funds a part of which were contributed for the poor and the balance for religious purposes and they became mingled, it was held that the entire fund could not be devoted to either purpose, but that as accurate a separation as possible should be made.[2]

An act of the legislature changing the trustees of a charity conferred upon a municipal corporation is valid ;[3] but a grant of land to a charitable corporation for a school or college or for a religious or charitable purpose by the legislature cannot be repealed.[4]

In England religion is scarcely regarded as an object of charity, charitable trusts being there chiefly under legal supervision and control, while here it leads in that respect.

An examination of reports of charity cases in this country discloses that the majority of such cases are for the maintenance of institutions of a religious or semi-religious character. Associations formed for re-

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[1] Hayden v. Stoughton, 5 Pick. 528.
[2] Atty.-Gen. v. Old South Church, 13 Allen, 474.
[3] Phil. v. Fox, 64 Pa. St. 169; Stone v. Framingham, 109 Mass. 303.
[4] Terrett v. Taylor, 9 Cranch. 43; University v. Fay, 2 Hayw. 310; Pawlett v. Clark, 9 Cranch. 292.

ligious objects of the various denominations and the numerous societies connected with and supported by them, absorb a large proportion of the charitable funds in this country.

On the other hand, the principal charitable objects named in the statute of Elizabeth, such as the repair of highways, ports, havens, bridges, relief of the poor, houses of correction, etc., have here been given up for the most part to municipal control. It is well settled that religious societies whether incorporated or not, have capacity to take and hold charitable bequests.[1]

"Trusts in favor of education and religion have always been considered charitable uses."[2]

Courts incline to direct the application of funds donated to religious purposes to the propagation of the doctrine which the donor desired to advance; and in order to ascertain such intention, will inquire into his individual faith and tenets, and when these are ascertained, will be governed by them.[3]

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[1] The Evangelical Assn's App., 35 Pa. St. 316.

[2] Owens v. The Missionary Soc. of the M. E. Church, 4 Kern. 380, 409, per DENIO, C. J. Bequests, devises and gifts to religious and educational purposes have been upheld in the following cases: To trustees for the benefit of a voluntary unincorporated association the object of which was the propagation of Christianity among the heathen; Bartlett v. King, 12 Mass. 537; "to the cause of Christ for the benefit and promotion of true Evangelical piety and religion," directing the same to be paid to certain persons named, and giving them full discretion and authority to select the societies and charitable purposes upon which to bestow the bounty; Going v. Emery, 16 Pick. 107; to an unincorporated female society in another state composed in part of married women for charitable purposes; Washburn v. Sewall, 9 Wel. 280; "to the Methodist Church at Darlington Court House, and the preachers of said church and the Pedee Mission to be selected by the trustees of said church," etc; Gibson v. McCall, 1 Rich. Law 174; to trustees and their successors to erect a school-house for the perpetual use of the parties to the deeds and the inhabitants residing nearer than any other school-house and such other persons as the inhabitants might admit; Wright v. Linn, 9 Penn. St. 433. See also Bartlett v. Nye, 4 Met. 378; Burbank v. Whitney, 24 Pick. 146; Brewster v. McCall, 15 Conn. 274; Carter v. Balfour, 19 Ala. 814; Ex'rs of Burr v. Smith, 7 Vt. 241.

[3] If a schism occurs in the body to whom the administration of the trusts is committed and part separate from the others the courts usually continue the

§ 227. Whether held by society in trust or absolutely.— A difficult question which sometimes arises when a devise or gift is made to a religious society expressed to be to charitable uses, is whether it is in reality such, or an outright donation to the society or corporation itself, and for that reason illegal because contrary to the statutory prohibition limiting the amount of property such bodies may hold.

If the trust declared is only nominal and the enjoyment and possession of the property by the members not affected by it, there would be no material difference between the nominal and the real owner such as would be required to constitute a trust for charitable purposes.

It was held in New York that the trust became executed in the *cestui que trust* under a statute in that state relative to the incorporation of religious societies authorizing them to take into their possession all the property of the society whether the same was given directly to such church or society or to any other person for their use, and to hold such property the same as if the right and title thereto had been originally vested in the trustees.[1]

Where the grantor or other person holds the estate in trust for the church or society prior to its incorporation the legal estate is transferred to the corporation, by operation of law, whenever the requisites of the statutes are complied with, and it is rendered legally competent to take the property in its corporate character.[2]

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administration with the old organization unless there has occurred on its part an essential departure in doctrine from the tenets of the founder. Redfield on Wills, p. 573, 2nd. Ed.; App. of The Lutheran Congregation, 6 Penn. St. 201; Combe v. Brazier, 2 Desau. 431; Atty.-Gen. v. Pearson, 3 Met. 353, 418.

[1] Van Deuzen v. Trustees, 3 Keyes, 550; s. c. 4 Abb. App. Decis. 465; Welsh v. Allen, 21 Wend. 147; Nicol v. Walworth, 4 Denio, 385.

[2] Bap. Church in Hartford v. Witherell, 3 Paige Ch. 296; Trustees of South Bap. Ch. v. Yates, 1 Hoffm. Ch. 141; 2 N. Y. Rev. Sts. 7th. Ed. p. 1658, sec. 4.

§ 228. **Effect of becoming incorporated.**—By becoming incorporated churches and religious societies become assimilated with respect to the internal management and control of their property to other private corporations. The trustees elected and acting as such and their successors are entitled to the custody, management, possession and legal control of all the property and funds belonging to their society in the same manner and to the same extent as directors in business corporations. "Their authority within the scope of the objects and purposes of the incorporation is superior to that of individual members, and not even a majority can, without their consent, take forcible possession of the church building and legally hold it."[1]

And a grant of property to trustees to hold for the use and benefit of a church not in existence, but to be afterwards organized, the trustees having no power to create the beneficiary or to dispose of the property for any purpose, will be upheld and the title will vest in the society thereafter organized, with capacity to acquire and hold the property.[2]

The principle established by the New York cases seems to be that unincorporated religious societies are not capable of acquiring the legal title, but may beneficially enjoy the estate if the legal title be conveyed or held in trust by some one competent to execute the trust. After the society becomes incorporated its equitable title becomes merged in the legal title which it then acquires.[3]

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[1] First Meth. Epis. Ch. v. Filkins, 3 Thomp. & C. 279, per E. D. SMITH, J. See to the same effect German, etc., Cong. v. Pressler, 17 La. Ann. 127; Green v. Cady, 9 Wend. 414; People v. Runkel, 9 Johns. 147.

[2] Miller v. Chittenden, 2 Clarke Ia. 315. See Second Cong. Soc. v. Waring, 24 Pick. 308; Howard v. Hayward, 10 Metc. 420; Fox v. Union Acad. 6 Watts & Searg. 353.

[3] Ref. Dutch Ch. v. Veederm, 4 Wend. 494. See African Meth. Epis. Ch. v. Conover, 27 N. J. Eq. 157. It was held that a deed of land to the acting trus-

§ 229. Sale of property of religious corporations.—But although the estates held by the religious corporations are considered legal so far as the right of legal control and possession is vested in the trustees selected by the members after incorporation, yet such estates partake so far of the nature of trust estates from a legal standpoint that the right of alienation does not exist by force and effect of the statute, and in the absence of further legislation can only be given by an order of court. In a case in New York it was said that sales of property so held are "against public policy unless authorized by the proper tribunal in the same way that the sale of the lands of infants is against public policy unless authorized by some court."[1]

It is held that the statute of Elizabeth which restrained ecclesiastical corporations from alienating their real estates became a part of the common law of that state; and previous to the general law allowing them to do so upon obtaining an order of court for that purpose, religious corporations possessed no power to sell and convey their lands. The object in requiring an order of court for that purpose is to protect corporators from a perversion of their property and funds.[2]

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tees of an unincorporated religious society conveys no title to the society. Bundy v. Birdsall, 29 Barb. 31. The provisions of the Cal. Stat. governing religious corporations are similar to those of New York both with respect to the manner of acquiring title and holding property. Limitations are placed upon the amount and value of property such corporations may own. Civ. Code, sec. 595. An important exception is made in favor of the bishop, chief priest or presiding elder of any religious denomination. These may when the administration of the temporalities require it incorporate themselves as corporations sole in the manner prescribed for the formation of other corporations as near as may be.

When so incorporated the limitation contained in sec. 595, with respect to churches and religious societies does not apply to them "when the land is held or used for churches, hospitals, schools, colleges, orphan asylums, parsonages, or cemetery purposes." Civ. Code, sec. 602.

[1] Ref. Church v. Schoolcraft, 65 N. Y. 134.

[2] Cong. Beth. Elohim v. Centr. Presby. Ch., 10 Abb. Pr.(N. S.)484. By statute in Cal. the superior court of the proper county is authorized to order a sale of church property upon proper application. Sec. 598 Civ. Code.

§ 230. Liens in favor of corporations upon property in their possession.—Several kinds of business corporations retain liens upon personal property and commercial paper without special contract to that effect. Some of these liens are sometimes such as existed at common law, others again are given by statute, while others arise from custom so uniformly observed as to become a part of the law of the business in which they obtain recognition. A familiar instance of a common law lien is that of common carriers for freight charges which is founded upon the same right and governed by the same principles to a great extent as other liens. The lien is lost by loss of possession but attaches to any part of property in possession which forms a part of the particular shipment upon which the freight was earned. But a carrier cannot subject goods on which the freight charges are due for their carriage to a lien for back freights;[1] nor can he hold them for the freight against the owner where he has received them, though without notice of the owner's right, from a wrongdoer.[2]

A delivery of the goods to the consignee or his assignee is an abandonment of the lien unless there is a contract to the contrary. But a mere undisclosed intention on his part that the lien shall continue does not qualify the effect of his act so as to preserve the lien. It would be otherwise, however, if possession were obtained by trick or fraud.[3]

A bill of lading stipulated that a cargo should be delivered to a consignee, "he paying freight and charges." It was held that the carrier had a lien upon the cargo

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[1] Leonard v. Winslow, 2 Grant's Cas. 139; Wallis v. London, etc., R. R. Co., L. R. 5 Exch. 62.

[2] Robinson v. Baker, 5 Cush. 137; Stevens v. Boston, etc., Co., 8 Gray, 262; Clark v. Lowell, 9 Id. 231.

[3] Dyer v. Grand Trunk R. R. Co., 42 Vt. 441.

for salvage, it coming within the terms of the contract; and that the fact that part of the cargo had been delivered did not divest the carrier of his lien upon the balance for the unpaid freight and charges.[1]

§ 231. **Lien not lost by warehousing the goods.**—If the bill of lading contain a provision that the goods shall be called for within a given time, and the consignee is in default in receiving the goods according to the contract, or if in the absence of any stipulation he fails to receive them within a reasonable time, the carrier may store the goods without impairing his lien. The possession of the warehouseman in that case is the possession of the carrier for the purpose of preserving the lien.[2]

A usage and regulation of a railroad company that freight shall be delivered within a certain time after notice of arrival, its and that if not taken away a fixed charge will be made for the use and occupation of the cars upon which the goods are loaded, if known to the consignee will be binding upon him.

For such charge the carrier has a lien as a warehouseman.[3]

§ 232. **Lien of banks on commercial paper.**—In long continued dealings between banks, usages are sometimes established concerning commercial paper and deposits

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[1] Chicago R. R. Co. v. Northwestern Un. Packet Co., 38 Ia. 377.

[2] Western Transp. Co. v. Barber, 56 N. Y. 544; Culbreth v. Phil., etc., R. R. Co., 3 Houston, Del. 392; Mobile, etc., R. R. Co. v. Prewett, 46 Ala. 63; Mohr v. Chicago, etc., R. L. R. Co., 40 Ia. 579; Merchants' Dispatch Transp. Co. v. Hallock, 64 Ill. 284; Cahn. v. Mich., etc., R. R. Co., 71 Id. 96.

[3] Miller v. Mansfield, 112 Mass. 260. But where the notice stated that "this company will assume no responsibility in regard to property after its arrival here," such notice was held to be an express disclaimer by the company of its character as warehouseman and that the company had no lien upon the goods for its charges for keeping them. Crommelin v. N. Y., etc., R. R. Co., 4 Keyes. 90.

which from recognition and acquiescence become a part of the commercial law, applicable to such transactions so as to bind all parties to them in the absence of an express contract showing a different intention.

Thus where an account current has been kept between two banks in a long course of dealings, wherein they mutually credited each other with the proceeds of all paper collected when received, and charged and credited such transactions to each other as principals in such transactions and not to the persons endorsing and depositing the same for collection, each bank has a right to retain the proceeds of notes and drafts then in its hands to cover the balance of account due from the other, independently of the claims of the real owner of such paper.

In such cases possession of the paper by the bank remitting it is *prima facie* evidence of ownership. Without notice to the contrary the bank receiving it is entitled to treat it as the property of the bank by which it was sent for collection, and is not bound to inquire into and will not be affected with respect to its lien by the question whether in fact the other bank held it as agent or owner. [1]

A usage of this kind is extremely liable to work injustice to innocent third parties and should be confined within the narrowest limits consistent with giving adequate protection to the immediate parties to the

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[1] Bank of Metropolis v. New England B'k, 1 How. 234. In this case the court remanded the case to the lower court, with the following instruction among others:—"If the jury find that, in the dealings mentioned in the testimony, the Bank of Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error is entitled to retain them against the defendant in error for the balance of account due from the Commonwealth Bank."

transaction, and such usage will never be presumed but must be proven.[1]

But where a firm in good standing which was owing a balance to a bank handed it drafts for collection on which collections were made, after which the firm failed and filed its petition in bankruptcy, it was held that the bank might apply the money collected on the draft toward the payment of the firm's indebtedness to it, and was not bound to turn the money over to the assignee for general distribution.[2]

§ **233. Lien of bank on deposits.**—Ordinarily a lien attaches in favor of a bank upon the moneys and securities of a customer in the usual course of business for such advances as have been made upon their credit. The lien then attaches to such securities and funds not only as against the depositor but against the unknown equities of all others in interest, unless modified or waived by some agreement express or implied, or by conduct inconsistent with the assertion of a lien. But it will not be permitted to prevail against the equity of the beneficial owner of which the bank had notice either actual or constructive.[3]

A fund deposited in a bank for a special purpose cannot, as against a creditor to whom the deposit has been pledged, be diverted by the bank to another purpose on the pretext that the bank has suffered the depositor to overdraw his general account.[4] An ordinary deposit

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1 Grant v. Taylor, 52 N. Y. 627.

2 In re Farnsworth, 5 Bissell, 233.

3 In Nat. B'k v. Ins.Co., 104 U. S. 54, Justice Mathews said:—"Although the relation between a bank and its depositor is that of merely debtor and creditor, and the balance due on the account is only a debt, yet the question is always open to whom in equity does it beneficially belong? If the money deposited belongs to a third person and was held by the depositor in a fiduciary capacity its character is not changed by being placed to his credit in his bank account.

4 Bank of U. S. v. MacLeaster, 9 Pa. St. 475.

made in the usual course of business is not a bailment.[1]

The indebtedness for which a lien is claimed must be an actual existing indebtedness at the time the right to the lien is asserted.

At the death of a party having a balance at a bank, the latter held his note not yet due. The defendant bank claimed a lien on the balance for the indebtedness for which the note was given when sued by the executor of the deceased for the balance, but the court held that to constitute a good set-off against an executor or administrator under the statute in an action brought by him it must have been due and payable from the decedent in his lifetime.[2]

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[1] Commercial B'k v. Hughes, 17 Wend. 94; Marsh v. Oneida Cent. B'k, 34 Barb. N. Y. 298; Davis v. Smith, 29 Minn. 201; In re Williams, 3 Ired. Eq. 346; State B'k v. Armstrong, 4 Dev. 519; Boyden v. B'k of Cape Fear, 65 N. C. 13; Hardy v. Chesapeake B'k, 51 Md. 562; Bank of the Republic v. Millard, 10 Wall. 152; In re B'k of Madison, 5 Biss. 515; Knecht v. U. S. Sav. Inst. 2 Mo. App. 563. See Detroit Sav. B'k v. Burrows, 34 Mich. 158.

[2] Jordan v. Nat. Shoe & Leather Bank, 74 N. Y. 467. This case is reported in 12 Hun, 512, where DANIELS, J. said:—"The policy as well as the requirements of the law concerning the payment of debts of deceased persons is, that they shall participate equally in the assets of the estate, so far as they may be required for that purpose, and that would be defeated by construing this section of the statute as allowing the set off of demands accruing and becoming due after the death of the deceased debtor." See also Beckwith v. Union Bank, 4 Sandf. 604; First Nat. B'k v. Mason, 95 Pa. St. 475.

CHAPTER XI.

ACQUISITION AND TENURE UNDER EXERCISE OF POWER OF EMINENT DOMAIN.

§ 234. Exercise of the power by private corporations.—The legislature may not only determine and declare what shall be a public use for which private property may be taken, in the exercise of the power of eminent domain, but having done so may delegate the power to take it in conformity to prescribed terms and conditions to individuals, and to corporations both public and private.[1]

§ 235. A franchise may be taken.—In West River

[1] *Right supervenes provisions of the federal constitution.* Coextensive with the power which each state possesses to regulate its internal affairs by suitable police regulations, and subject likewise to the condition that the purpose for which it is exercised must appertain to the self-preservation and good government of the community at large, is the right to take private property for public use upon making just compensation to the owner. The power to do this is so essential to the maintenance of sovereignty and the performance of governmental duties by the States, that it supervenes all private rights, and by long established construction is deemed to have been impliedly excepted from the general terms of the federal constitution with respect to the inviolability of contracts.

An attribute of sovereignty. Eminent domain is the sovereign right of the state to take private property for public use. The right exists in the limited sovereignty of the federal government as well as in the more general sovereignty of the States. Pertaining to the former the public use must be within the scope of its limited powers and necessary for their preservation, but cannot be exercised for the enlargement of such powers or in derogation of the reserved sovereign rights of the States. The right of eminent domain in each is commensurate with the extent of their respective powers.

By the same imperative necessity this power belongs to the States as well as to the federal government.

Power extends to every species of property. The power of eminent domain may be wielded in a proper case and subject to the condition that due compensation be made against every species of property whatever and from whatsoever source acquired. In re Met. El. R. Co., 2 N. Y. S. 278. Contracts as well as tangible property derived from the State itself are deemed to be acquired and held subject to the superior title and ultimate right of revocation reserved and to be asserted by the State whenever required for the public good. There are two exceptions to this statement—money or that which ordinarily passes as such, and rights in action which can only be made available when made to produce money. It can never be needful to take either of these under this power. An additional reason may be mentioned. Money is itself an instrumentality of sovereignty in the hands of the federal government.

Bridge Co. *v.* Dix,[1] the court say :—"We are aware of nothing peculiar to a franchise which can class it higher or render it more sacred than other property. A franchise is property, and nothing more. . . . . A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position, with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under the patent or contract with the State; and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract."[2]

§ **236. Corporate interest of members not exempt.**—The contracts between members in a corporation and their corporate interests in its property of every description are like other property subject to be appropriated. Nor can there be in any act of incorporation any contract binding on the State that the corporation so formed may not have its operations suspended by the State in the exercise of the power of eminent domain.[3]

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[1] 6 How. 507, 531, 533.

[2] See also, Matter of Kerr, 42 Barb. 119; Red River Bridge Co. v. Mayor, etc., of Clarkville, 1 Sneed, 176; In re Towanda Bridge Co., 91 Pa. St. 216; Richmond, etc., R. R. Co. v. Louisa R. R. Co., 13 How. 83; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 659; Crosby v. Hanover, 36 N. H. 420; Central Bridge Co. v. City of Lowell, 4 Gray, 481; Philadelphia, & C. Ry. Co.'s Appeal, 102 Pa. St. 23; Delaware, etc., Canal Co. v. Raritan, etc., R. R. Co., 16 N. J. Eq. 366; Shorter v. Smith, 9 Ga. 517; James River, etc., Co. v. Thompson, 3 Gratt. 270.

[3] Backus v. Lebanon, 11 N. H. 23. A provision in a charter authorizing the construction of a toll bridge across a river or arm of the sea by a corporation and providing that it shall not be lawful for any one to erect or maintain a bridge or ferry in or near the same place, does not preclude the State from granting a similar privilege to others, with the right to condemn and appropriate the necessary property. Thompson v. N. Y. & Harlem R. R. Co., 3 Sandf. Ch. 625; Mohawk Bridge Co. v. Utica, etc., R. R. Co., 6 Paige Ch. 554.

The property of the United States is subject to condemnation in the exercise of eminent domain unless reserved and held by the national government for specified national purposes.[1]

Although franchises pertain to the sovereignty, yet they are property in the sense that the owner may be deprived of them in the exercise of the power. They cannot be taken away, however, except where absolutely necessary to the enjoyment and exercise of a subsequent grant. To permit the extinction of franchises on a plea of necessity created by a corporation for its own convenience or profit would place the power to capriciously destroy valuable privileges in the hands of the grantee of the latest franchise.[2]

§ **237. Various instances of its exercise.**—This right to appropriate the franchises and property of existing corporations has been exercised upon a great variety of occasions of superior public convenience and necessity, and with different results to the corporations whose property was appropriated.[3]

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[1] U. S. v. Bridge Co., 6 McLean, 517.

[2] In re Boston, etc., R. Co., 53 N. Y. 574; Pennsylvania Co.'s Appeal, 93 Pa. St. 150; Inhab. of Springfield v. Conn. River R. R. Co., 4 Cush. 63; Matter of N. Y., etc., R. Co., 77 N. Y. 278.

[3] It was held a railroad may appropriate a turnpike, White Riv. Tp. Co. v. Vt. Cent. R. Co., 21. Vt. 594; and that a turnpike may be taken for a public highway, Richmond F. & P. R. Co. v. Louisa R. Co., 13 How. 71; Armington v. Barney, 15 Vt. 745. A State may make a public road through lands of the United States. U. S. v. R. R. Br. Co., 6 McL. 517. So a town may condemn for a highway the part of an interstate bridge in the state. Crosby v. Hanover, 36 N. H. 404. A lease owned by an existing railroad company may be appropriated by another. Matter of N. Y. & H. R. R. Co., 63 N. Y. 326; 5 Hun, 20. So may lands of a gas company. In re N. Y. C., etc., R. Co., 77 N. Y. 248; or of a steamboat company; Re N. Y. & C. R. Co., 99 N. Y. 12; 1 N. E. 27. One street railway may appropriate for its necessary purposes right of way over property of another. Sixth Av. Ry. Co. v. Kerr, 72 N. Y. 330. See also, Boston & L. R. R. Co. v. Salem & L. R. R. Co., 2 Gray, 1; New York, H. & N. R. R. Co. v. Boston, H. & E. R. R. Co., 36 Conn. 196; Central Bridge Co. v. Lowell, 4 Gray, 474; Enfield Toll B. Co. v. Hartford & N. H. R. R. Co., 17 Conn. 454; Boston Water-power Co. v. Boston & W. R. R. Co., 23 Pick. 360.

Of course there is no such thing as appropriating the franchise of being a corporation under the power, it not being considered as property. That can only be taken by a special proceeding prosecuted by the State.[1]

The power only extends to the taking of other franchises owned by a corporation, as the right to use streets, to the exclusive use of a right of way and the like. This right has often been exercised by railroads requiring to cross highways or other railroads.[2]

As such necessity arises from the necessities of the case it need not be expressly conferred.[3]

The right extends to crossing railroads chartered by the federal government.[4]

But the right to appropriate corporate property is not confined to railroad companies. It may be exercised by canal, water irrigation, and other companies when sufficient necessity exists therefor.[5]

§ 238. **Its exercise of vital importance.**—It is a power the possession and exercise of which is absolutely essential to the existence and well-being of municipal corporations, and nearly so in the case of many private corporations whose franchises and operations are of a public nature. It is upon the principle of a resulting

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1 Infra, Ch. XXXV.

2 New York & H. R. R. Co. v. Forty-second St. & G. S. F. R. R. Co., 50 Barb. 309; Starr v. Camden & Atl. R. R. Co., 24 N. J. L. 592; Matter of Central R. R. Co. of L. I., 1 T. & C. (N. Y.) 419.

3 Morris & E. R. Co. v. Central R. Co., 31 N. J. L. 206.

4 U. P. R. Co. v. Leavenworth, etc., R. Co., 29 F. 728. As to right to condemn part of right of way which another company is not using. See Armiston, etc., R. Co. v. Jacksonville, etc., R. Co., 2 So. 710, sustaining the right. But one railroad company cannot parallel their track on another under statutory authority to cross, Ill. Cent. R. Co. v. Chicago, etc., R. Co., 122 Ill. 473; 13 N. E. 140; though one turnpike can be laid out partly over the route of another; Backus v. Lebanon, 11 N. H. 19.

5 See Lehigh, etc., R. R. Co. v. Orange, etc., Co., 42 N. J. Eq. 205; 7 A. 659. Exercise of the right by water companies. See Woodbury v. Marblehead Water Co., 145 Mass. 509; 15 N. E. 282; Pickman v. Town of Peabody, 145 Mass. 480; 14 N. E. 751.

benefit to the public that this power is extended to private parties and corporations. By virtue of it they have been authorized to take private property for a great variety of purposes, the most unusual and important of which are the making of highways, turnpikes, roads, steam and street railroads and canals, the erection and construction of wharves and basins, the drainage of swamps and marshes, the irrigation of crops and premises, and the supplying of water to cities, towns and villages. In all such cases the object of the legislative grant of the power is the public benefit resulting from the contemplated improvement.[1]

§ 239. **Legislature may select the agency and determine the purpose.**—That the legislature may thus select any agency it sees fit for the exercise of eminent domain, and also that it may determine what purposes shall be deemed public, are propositions too deeply rooted in the jurisprudence of this country to admit now of doubt or discussion. Making an application of this doctrine to railway corporations, conceding it to be settled that these facilities for travel and commerce are a public necessity, if the legislature, reflecting the public sentiment, decide that the general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should be only provided for in the way which is least consistent with the public interest.[2]

§ 240. **Authority need not be special.**—It is not neces-

[1] Beekman v. Saratoga, etc., R. R. Co., 3 Paige, 45; Wilson v. Blackbird Co. Marsh Co., 2 Pet. 245; Napa Valley R. R. Co. v. Napa County, 30 Cal. 437; S. & V. R. R. Co. v. Stockton, 41 Cal. 148.

[2] Cooley Const. Lim., 667, citing numerous authorities.

sary therefore that the legislature should designate either the particular agency to accomplish the appropriation or the property to be taken; and the authority need not be special but may be conferred by the general law. It is in the nature of a trust reposed in the projectors of the undertakings declared by the law to be public upon the presumption that they will not enter upon an improvement which the public does not need.[1]

The power given by a general railroad act to railroad corporations to acquire title to "any real estate required for the purposes of the incorporation" does not extend to property already dedicated to and held for another public use by authority of law, save in the cases where it is expressly given by such act.

Such a power must be conferred by express terms or necessary implication, and the implication does not arise if the powers expressly conferred can by reasonable intendment be exercised without such an appropriation.[2]

A mere prospective public use to which property may be devoted other than that for which it is presently sought to be condemned does not justify condemnation proceedings. Such future and probable use, though of greater public benefit than that to which the property has been already devoted, must yield to present necessity.[3]

Mere priority of occupation by another company in

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[1] Wier v. St. Paul R. R. Co., 18 Minn. 155; Buffalo R. R. v. Barnard, 9 N. Y. 100.

[2] Matter of Boston & Albany R. R. Co., 53 N. Y. 574. See also, Boston, etc., R. R. Co. v. Lowell, etc., R. R. Co., 124 Mass. 368.

[3] Colorado Eastern Ry. Co. v. Union Pac. Ry. Co., 7 Ry. & Corp. L. J. 373. See also Springfield v. Railroad Co., 4 Cush, 63; Illinois & M. Canal Co. v. Chicago & R. R. Co., 14 Ill. 314; Prospect Park v. Williamson, 91 N. Y. 552; Eastern R. Co. v. Boston & M. R. Co., 111 Mass. 125; Grand Rapids N. & L. S. R. Co. v. G. R. & I. R. Co., 35 Mich. 265.

contemplation of a future public employment of the property gives no exclusive right.[1]

§ 241. **Exercise of the power by foreign corporations.**— The legislature may in its discretion delegate the power to a corporation of another state.[2]

But under a general act a foreign corporation has no power to condemn lands.[3]

It is well settled that foreign corporations may be excluded from the privilege of exercising the power,[4] but generally have the right extended to them by statute.[5]

§ 242. **The power must be exercised impartially.**— While all property rights are equally subject to destruction or loss in the necessary exercise of the power, yet all are equally sacred in the absence of such necessity, and the property of one citizen should not be selected for condemnation rather than another's unless it be done to subserve some public use, or a higher and more obvious public use than that to which it is at

1 East St. L. C. Ry. Co. v. East St. L. U. Ry. Co., 108 Ill. 265; Lake S. & M. S. Ry. Co. v. Chicago & W. I. R. Co., 97 Ill. 506.

2 Matter of Townsend, 39 N. Y. 71; Morris Canal Co. v. Townsend, 24 Barb. 658.

3 Holbert v. St Louis R. R. Co., 45 Ia. 23.

4 Koenig v. Chicago, B. & Q. R. Co. (Neb.), 43 N. W. 423; State v. Scott (Neb.), 36 N. W. 121; Trester v. Missouri Pac. Ry. Co., 23 Neb. 242; 36 N. W. 502.

5 Laws N. Y. 1881, c. 649, amending act, April 2, 1850, provide that "if at any time after the construction of any railroad operated by steam, by any company now existing, or that might hereafter be created, such company, or any company owning, operating, or leasing such railroad, or any mortgagee or mortagees in possession of such railroad, or person or persons appointed as receiver or receivers of any such railroad, in the possession of and operating the same, shall require, for the purpose of its incorporation, or for the purpose of running or operating any railroad so owned," etc., "any real estate in addition to what has been already required for the purposes of such railroad," in the manner therein provided. It is held that foreign corporations are entitled to the benefits of the act. In re Marks, 6 N. Y. 105. See also Abbott v. New York & N. E. R. Co., 145 Mass. 450; 15 N. E. 91.

present devoted. Whenever it is sought to take the property of one man which he has fairly acquired, and the general law protects, in order to transfer it to another, even upon a complete indemnification, it will naturally be considered as an extraordinary act of legislation, which ought to be viewed with jealous eyes, examined with critical acuteness, and scrutinized with all the severity of legal exposition. An act of this sort deserves no favor; to construe it liberally would be sinning against the rights of property. In England, it has been said that all courts have, for obvious reasons, at all times construed such legislative enactments most strictly.[1]

§ **243. How held by the appropriator.**—On the same principle that the taking of property under the power can only be exercised for the supposed public benefit, it cannot after having been taken be held otherwise than in its application to the public use for which it was taken.[2]

§ **244. The authority strictly construed.**—An act authorizing any person or corporation to construct any railroad, canal, turnpike, toll bridge, etc., and to take real estate for the purpose does not justify a taking for public convenience merely. It could only be taken to satisfy a public necessity.[3] The right to exercise the power of eminent domain is in derogation of common right and the statute conferring it should be strictly construed. If the power or the right to exercise it in a

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[1] Binney's Case, 2 Bland. Ch. 99.

[2] Lance's Appeal, 55 Pa. St. 16; Nesbitt v. Trumbo, 39 Ill. 110; Osborn v. Hart, 24 Wis. 89; Bankhead v. Brown, 25 Iowa, 540; Brown v. Beatty, 34 Miss. 227; Crear v. Crossley, 40 Id. 175; Bonaparte v. Camden & Amboy R. R. Co., Baldw. 205.

[3] Memphis Freight Co. v. Memphis, 4 Coldw. 419.

given case is doubtful, the doubt should be resolved adversely to the claim of right. Yet it should not be construed so strictly and literally as to defeat the evident purpose of the legislature in granting it.[1]

A railroad company will not be confined in the acquisition of property under the power to a sufficient amount for its railway, but will be allowed to appropriate in addition lands on which to erect passenger depots, shelter for cars, engines and other rolling stock when not in use, and warehouses for the storage and delivery of freight intended for transportation or delivery to consignees at its place of destination. It cannot, however, be extended by implication.[2] The prescribed method of giving notice by publication must be strictly complied with.[3]

The general statute law relating to condemnation proceedings by railroad companies contemplates that such rights of private use of the land taken as are of the nature to interfere with the operation of the railroad shall be determined in the condemnation proceedings; but the landowner has not a reserved right of private

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[1] Lackland v. Northern Missouri R. R. Co., 31 Mo. 185; Zack v. Pa. R. R. Co., 25 Pa. St. 394; 185 State v. Jersey City, 25 N. J. 309; Van Winkle v. R. R. Co., 14 Id. 162; Gilmer v. Lime Point, 19 Cal. 47; Locks v. Nashua & Lowell R. R. Co., 104 Mass. 1.

[2] Power given to a railroad company to construct its track along a river does not authorize its construction in or upon the river. Stevens v. Erie R. Co., 21 N. J. Eq. 259. See also New York & H. R. R. Co. v. Kip, 46 N. Y. 546; Browning v. Camden & W. R. R. Co., 4 N. J. Eq. 47; Rensselaer & S. R. R. Co. v. Davis, 43 N. Y. 137; Bonaparte v. Camden & H. R. R. Co., Bald. 205. The power cannot be exercised after the time given a railroad company within which to complete its road has expired; Atlantic, etc., R. Co. v. St Louis, 66 Mo. 228; nor is the right assignable. Mahoney v. Spring, etc., Co., 52 Cal. 159.

A railroad company in Iowa cannot condemn land for an elevator. Johnson v. Chicago, etc., R. Co., 58 Ia. 537. A similar view obtains in New Jersey State v. United, etc., R. R. Co., 43 N. J. L. 110. It was held that a bridge company cannot, under a change in its approaches designated in a special charter, condemn land under the change. Re Poughkeepsie, etc., Co., 108 N. Y. 483.

[3] Hull v. Chicago B. & Q. R. Co., 21 Neb. 371; 32 N. W. 162. Compare In re Metropolitan E. Ry. Co., 2 N. Y. S. 278.

crossings unless so defined, and compensation to the landowner is to be assessed accordingly.[1] A constitutional provision imposing additional conditions to the exercise of the right applies to corporations in existence at the time of its adoption.[2] But in some cases neither a strict nor a liberal but a reasonable construction has been applied.[3]

A company succeeding to the franchises and property

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[1] Cedar Rapids I. F. & N. W. Ry. Co. v. Raymond, 37 Minn. 204; 33 N. W. 704.

[2] Pennsylvania R. Co. v. Magee (Pa.), 13 A. 839. An act extending boundaries so as to include private lands and which does not provide for compensation for the lands so taken, is unconstitutional. Hancock Stock Fence Law Co. v. Adams, 87 Ky. 417; 9 S. W. 246; Daly v. Georgia S. & F. R. Co., 80 Ga. 793; 7 S. E. 146; In re Poughkeepsie Bridge Co., 108 N. Y. 483; 15 N. E. 601. An act giving a railroad company a right to acquire land for railroad purposes does not give the company a right to dig a ditch three miles long, at right angles to its track, to carry off the water accumulating along the road bed and turn it on the land of another. Olson v. St. Paul M. &, M. Ry. Co., 38 Minn. 419; 37 N. W. 953.

Under act Ill., July 1st, 1887, it was held that a company whose road terminated on the Ohio river at Cairo could not condemn land for an incline track and transfer ferry-boat landing, in order to connect with another road. St. Louis & C. R. Co. v. Thomas, 34 F. 774.

An act giving a company authority to conduct the waters of a certain pond, by subterranean pipes, into its own lands, and construct and maintain dams, pipes, fountains, and reservoirs upon and over any land whatsoever, and providing a remedy only for damages caused by the taking of the water, did not authorize it to construct a dam and sluice-ways at the mouth of said pond, and to flow the lands adjacent thereto. Pickman v. Town of Peabody, 145 Mass. 480; 14 N. E. 751.

Land dedicated for a public street cannot be condemned to the use of a railroad, in the absence of an express statutory right. Cornwall v. Louisville & N. R. Co., 87 Ky. 72; 7 S. W. 553.

[3] Proprietors of Locks, etc., v. Nashua & L. R. R. Co., 104 Mass. 1; Lackland v. North Mo. R. R. Co., 31 Mo. 180; Currier v. Marietta & Cim. R. R. Co., 11 O. St. 228; State v. Jersey City, 25 N. J. L. 309; Zack v. Pennsylvania R. R. Co., 25 Pa. St. 394; Doughty v. Somerville & E. R. R. Co., 21 N. J. L. 442; Van Wickle v. Camden & A. R. R. Co., 14 N. J. L. 162. In Com. v. Erie & N. E. R. Co., 27 Pa. St. 339, the court refused to enjoin a company from operating its road which it had built in an unauthorized place, and made an order requiring a relocation and reconstruction. See also Lance's Appeal, 55 Pa. St. 16; Gilmer v. Lime, etc., Co., 19 Cal. 47. It was held a lessor company might condemn land for the use of its lessee. Re N. Y., etc., R. Co., 99 N. Y. 12. A company succeeding to the franchises and property of another may receive and complete its condemnation proceedings. Bradley v. N. Sac. R. Co. 38 Minn. 234; 36 N. W. 345.

of another may revive and complete its condemnation proceedings.[1]

But it seems that sites for the manufacture of cars and for the erection of dwellings of operatives cannot be taken.[2] And where a railroad corporation sought to condemn land over which to build a switch branch road or lateral work to reach a private manufactory, a steel mill, for the purpose of transporting freight to and from the same over the company's road, it was held that the use to which the land was to be subjected was private.[3]

§ **245. The legislature cannot bind the state not to exercise it in the future.**—The power of eminent domain being an inherent element of sovereignty, it cannot be divested out of the State or abridged by contract or treaty so as to bind future legislatures.[4] Nor can the right be divested by private contract.[5]

§ **246. Only to be exercised for the purposes mentioned and subject to the conditions imposed in the Constitution.**—The

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[1] N. Y. & Harlem R. R. Co. v. Kip, 46 N. Y. 546.

[2] Eldridge v. Smith, 34 Vt. 484. Among the purposes for which railroad companies may take land are, for cattle yards, repair shops, turnouts, for the deposit of wood and lumber transported and additional tracks needed on account of an increase of business. Hannibal, etc., R. R. Co. v. Muder, 49 Mo. 165; N. Y. Cent. R. R. Co. v. Metrop. Gas Light Co., 63 N. Y. 326; Cumberland Valley R. R. Co. v. McLanahan, 59 Pa. St. 23; State v. Mansfield, 23 N. J. 510; Chicago, etc., R. R. Co. v. Wilson, 17 Ill. 123. It was held that the land may be taken for those purposes notwithstanding the fact that other land equally convenient can be had at private sale. N. Y. & Harlem R. R. Co. v. Kip, 45 N. Y. 546.

[3] Pittsburg W. & K. R. R. Co. v. Benwood Iron Works, 31 W. Va. 710. See also, Railroad Co. v. Dix, 109 Ill. 237; Railroad Co. v. Wiltse, 6 N. E. Rep. 49. Compare Getz's Appeal (Pa.), 13 Am. & Eng. R. Cas. 186.

[4] Per Colt, J., in Eastern R. R. Co. v. Boston, & C. R. R. Co., 111 Mass. 125, 131. See also Cooley on Constitutional Limitations, 342–344.

[5] Cornwall v. Louisville & N. R. Co., 87 Ky. 72; 7 S. W. 553, where land was ceded to a city for use of a railroad, on condition that no more should be taken for that purpose, and proceedings were instituted by the company to have additional lands condemned.

Fifth Amendment to the Constitution of the United States provides that "no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." In no part of the Constitution is found a negation or limitation of the right on the part of the states to take private property for public use, and the last clause of the Fifth Amendment imposes a condition to its exercise which by clear implication recognizes the right itself.

There is only one other condition, and it is contained in the clause immediately preceding. It can only be taken "by due process of law." The provision that no person shall be deprived of property without compensation does not apply to the exercise of the right of eminent domain by a state.[1]

But this additional condition is found in all the state constitutions. Consequently only three leading questions can ever arise in any case growing out of an exercise or attempt to exercise the power:

1.—Is the compensation provided or paid adequate or "just"?

2.—Is the intended use a public use?

3.—Are the means provided and the method prescribed for ascertaining the value and taking the property "due process of law"?

The first of these raises an issue of fact, the second one of mixed law and fact, while the last is purely legal.

§ 247. The compensation to be judicially ascertained.—The requirement that "just" compensation must be made would seem to imply that proper legal means must be provided by the law under which the appropriation is made, it being a matter which requires

[1] Wilson v. Baltimore & P. R. Co., 5 Del. Ch. 523.

judicial ascertainment. This is very generally recognized by the states, and impartial tribunals are designated either in constitutions or statutes before which the party interested is entitled to appear and have the compensation fixed with the usual rights and proceedings which attend judicial investigations.[1]

§ **248. The tribunal.**—This requirement is not satisfied by the state through the legislature fixing the compensation, for this would be making it the judge in its own cause.[2] But the proceeding is not of such a nature as entitles the party to trial by jury as matter of right, unless the state constitution has so provided.[3]

Whatever the tribunal which may have been provided in the constitution or legislation, it is a familiar rule almost invariably recognized, that the party should have the same opportunity to appear and be represented as in any other case of judicial cognizance, and unless he have such opportunity he would not be bound by the result.[4] There are numerous and important differences in the proceedings in the several states, and their validity depends principally upon the course of practice of the court or other tribunal where the condemnation is had.[5]

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[1] Rich. v. Chicago, 59 Ill. 286; Cook v. South Park Com'rs, 61 Ill. 115. See Ames v. Lake Superior, etc., R. R. Co., 21 Minn. 241. All notices, etc., required by law must be given. People v. Koiskern, 54 N. Y. 52; Power's Appeal, 29 Mich. 504.

[2] Rich. v. Chicago, 59 Ill. 286; Petition of Mount Washington Co., 35 N. H. 134; Ames v. Lake Superior, etc., R. R. Co., 21 Minn. 241; Ligat v. Commonwealth, 19 Rem. St. 456, 460.

[3] Charles River Bridge Co. v. Warren Bridge, 7 Pick. 344; s. c. 11 Pet. 420, 571, per McLean, J. And see Rhine v. McKinney, 53 Tex. 354.

[4] Power's Appeal, 29 Mich. 504; Hood v. Finch, 8 Wis. 381; Dickey v. Tennison, 27 Mo. 373. As to the right to order reassessments, see Clark v. Miller, 54 N. Y. 528.

[5] In Minnesota an act making no provision for "just compensation," its requirement that railroad companies shall permit others, on application, to conduct elevators on the lands of such companies, was held void. State v. Chicago, M. & St. P. Ry. Co., 36 Minn. 402; 31 N. W. 365.

Evidence should be allowed as to the damages per acre, without definite proof

Whatever facts tend to enlighten the jury on the subject, and thus enable them to reach a correct conclusion as to the value of the property taken, are admissible.[1] A judicial ascertainment of compensation is unimportant to the owner where the government assumes responsibility for claims arising from the condemnation.[2] A de-

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as to the number of acres involved. Ball v. Keokuk & N. W. Ry. Co., 71 Iowa, 306; 32 N. W. 354.

In support of the estimates of witnesses they may be interrogated as to the location, advantages, and surroundings of the property. Little Rock Junction Ry. v. Woodruff, 49 Ark. 381; 5 S. W. 792.

[1] Pennsylvania S. V. R. Co. v. Keller (Pa.), 11 A. 381.

In an action to assess damages for property taken by a railroad company in exercise of the right of eminent domain, where the title is in dispute, evidence that part of the premises in question did not belong to plaintiff, and that his claim is excessive, is admissible. Pennsylvania S. V. S. Co. v. Keller (Pa.), 11 A. 381. Evidence showing the land in question to be a specially eligible for a bridge-site was properly admitted, as affecting the question of its value. Little Rock Junction Ry. v. Woodruff, 49 Ark 381; 5 S. W. 792.

In ascertaining the value of lands required for railway purposes, the latitude allowed to the parties in producing evidence of facts in support of the estimates of witnesses is a matter largely in the discretion of the presiding judge. The owner, however, should be allowed to put in evidence all facts which a vendor would adduce if he were attempting a private sale. Opposing counsel should be allowed to make every inquiry an individual about to buy would feel it in his interest to make. Id. See also, Central Branch U. P. R. Co. v. Andrews, 37 Kan. 162; 14 P. 509.

Evidence of sales of lots situated like the petitioner's land is not incompetent because they were small, and the latter large. Sawyer v. City of Boston, 144 Mass. 470; 11 N. E. 711.

In assessing the value of a strip of land condemned for a right of way, which was not itself used for cemetery purposes, but was part of the tract of land owned by a cemetery association, it was held that the value of lots in other cemeteries was not competent evidence. Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co., 121 Ill. 199; 12 N. E. 536.

The general selling price of lands in the neighborhood of the land in question cannot be shown by evidence of particular sales of alleged similar properties, at a price fixed in the mind of the witness, for the knowledge of what lands are generally held at for sale, and at which they are sometimes actually sold, *bona fide*, in the neighborhood may differ. Pittsburgh V. & C. Ry. Co. v. Vance, 115 Pa. St. 325; 8 A. 764.

But in a proceeding by a railroad corporation to condemn a right of way through a farm, evidence for plaintiff as to the effect produced upon the selling value of other farms in the same county, by their being cut by railroads, as shown by actual sales, is not admissible. Kiernan v. Chicago S. F. & C. R. Co., 123 Ill. 188; 14 N. E. 18.

[2] Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., 70 Wis. 635; 35 N. W. 529.

termination of the amount of compensation by commissioners is sufficient.[1] But generally the necessity for the taking must be shown in the petition.[2]

§ **249. Treaty with owner.**—Where an effort to agree upon compensation is required, it must be alleged and shown that the company cannot agree with the owner as to the price.[3] The same rule of pleading governs with respect to filing maps.[4]

Where the company fails to agree as to damages with the owner it is not bound to show negotiations with the lessee of the owner, the latter not being able to give the title and right acquired.[5] Questions arising upon the petition as to the treaty with the owners of the land, and the inability to acquire title by reason of the exorbitant price asked by such owners, are jurisdictional and controvertible.[6]

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1 Patch v. City of Boston, 146 Mass. 52; 14 N. E. 770, or by assessors. Oliver v. Union Point & W. P. R. Co., 83 Ga. 257; 9 S. E. 1086. An appeal from the award of commissioners (bringing in question only the sufficiency of the damages) is not inconsistent with the proceedings, to vacate the appointment of the commissioners, and to oppose the condemnation proceedings. Minneapolis Ry. Terminal Co. v. Minneapolis Union Ry. Co., 38 Minn. 157; 36 N. W. 105. See also St. J. Ter. R. Co. v. H. & St. J. R. Co., 94 Mo. 535; 6 S. W. 691.

For presumptions in favor of regularity and fairness of proceedings by commissioners, see Wilmington & W. R. Co. v. Smith, 99 N. C. 131; 5 S. E. 237.

2 New York, N. H. & H. R. Co. v. Franz, 55 Hun, 610. Where land sought to be condemned by a railroad company lies on the direct line between the end of its road, as built, and the terminus at which it aims, the fact that it could have reached the terminus, by a circuitous route, without crossing such land does not show that the land is not necessary for the construction of the road. Colorada E. Ry. Co. v. Union Pac. Ry. Co., 41 F. 293.

3 Portland & G. Turnpike Co. v. Bobb (Ky.), 10 S. W. 794; Reed v. Ohio & M. Ry. Co., (Ill.) 17 N. W. 807. Compare Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390; 38 N. W. 294.

4 In re Rochester Electric Ry. Co., 57 Hun, 56; 10 N. Y. S. 379; Durham & N. Ry. Co. v. Richmond & D. R. Co., 104 N. C. 673; 10 S. E. 664.

5 Rochester, H. & L. R. Co. v. Babcock, 110 N. Y. R. 119; 17 N. E. 678.

6 Weiden v. Grand Rapids, L. & D. R. Co. (Mich.), 37 N. W. 872; Howland v. School District, No. 3, 15 R. I. 184; 2 A. 549; 8 A. 337. Where companies, shortly before filing their petitions, served written offers to purchase upon the owners of some of the parcels, left offers as to other parcels with some

§ 250. The public use.—The question of what is a public use has often been said to be one of law purely. This expression doubtless arose from the fact that it is usually determined by the legislature in the first instance, and thus becomes embodied in the law as part of it after having been arbitrarily passed upon. But that it is not strictly and always a legal question is evident when we consider that a great many facts both of a general and a special nature must be brought to bear in establishing the dividing line between a public and a private use. Especially is this true in cases where the State does not seek to make the appropriation for public use directly to itself, for instance for capital grounds, but through the agency of private corporations whose

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person upon the premises, which in some cases came to the notice of the owners, and all these offers were declined, or taken no notice of, or the counter-offer was considered exorbitant and most of the owners had already sued for damages, and in their verified complaints had placed the value of the property at sums which the companies considered grossly extravagant, it was held that, as the estimates of value entertained by the owners and the companies differed so widely as to render it almost certain that the offer to purchase would be rejected, the efforts made by the companies were a sufficient compliance with Laws N. Y. 1850, c. 140, requiring a railroad company, before instituting condemnation proceedings, to make a *bona fide* and unsuccessful effort to purchase the property sought to be taken. In re Metropolitan E. Ry. Co., 2 N. Y. S. 278, holding also, that, as the allegations of the petition concerning the offers to purchase involved matters as much within the knowledge of the owners as of the companies, it was for the owners to show that they did not, in fact, receive the offer, or, if they did not receive it, why they did not accept, or make a counter-offer, and that there was reasonable ground to suppose that further negotiations might have resulted in an agreement.

Under Sess. Acts Ala., 1884–85, p. 223, relating to condemnation of land by railroad companies, providing that if the owners of the land cannot agree with the company as to damages, "or, in case such owner is an infant, such value or damages shall be ascertained in the manner directed by the general laws;" a previous attempt to agree on damages need not be alleged nor proved in the case of lands owned by an infant, though he has a guardian. Brown v. Rome & D. R. Co., 86 Ala. 206; 5 So. 195.

An act requiring a railroad company to run through a certain town if the citizens of such town will pay the excess of the cost of that route over the one proposed by the company, does not affect the right of the company to proceed to condemn the right of way before the cost of the route through the town has been determined and payment of the same by the citizens promised. Macon & B. R. Co. v. Stamps (Ga.), 11 S. E. 442.

business though prosecuted for private gain largely interests the public. Private lands certainly could not be taken for the use of a private hotel company on which to erect hotel buildings for use in its business; but such appropriation might be very necessary for the accommodation of the travelling public on a line owned and operated by a railroad company.

§ **251. Same—how determined.**—And on account of the differences in topography, climate, commercial and industrial occupations, in the various states, what would be a public use in one would be private in another. If the legislature has decided the question in the first instance the statute embodying its decision is not open to the objection by a party whose property is taken under it, that he is deprived of it without due process of law, for such statute is based upon general considerations of public necessity and welfare, and in that sense and to that extent constitutes by its own inherent force and effect "due process of law."

But its decision is not always conclusive upon the courts, as to whether or not the use is public, and when its validity is brought before them they may re-examine and pass judgment upon the matter; and to determine whether the purpose designated or in view is public, may review all the facts and circumstances with as much authority and effect as the legislature.[1]

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[1] Matter of Deansville Cemetery Ass'n, 66 N. Y. 569; Harding v. Goodlett, 3 Yerg. 40; Bankhead v. Brown, 25 Iowa, 540; Chicago, etc., R. R. Co. v. Lake, 71 Ill. 333; Olmsted v. Camp, 33 Conn. 551; Tylor v. Beacher, 44 Vt. 648; Loughbridge v. Harris, 42 Ga. 500; Water-Works Co. v. Burkhart, 41 Ind. 364; Scudder v. Trenton, etc., Co., 1 N. J. Eq. 694; Ryerson v. Brown, 35 Mich. 333.

The constitution of Missouri, 1875, provides that, "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined." Under this provision it is held that the question should not be submitted to a jury. City of Savannah v. Hancock, 91 Mo. 54; 3 S. W. 215.

Same provision is found in Colorado. See Const. Colo., art. 15, sec. 4; Den-

Great deference, however, will always be paid to the legislative judgment as expressed in enactments providing for appropriations of property. And where there is any doubt whether the use to which the property is proposed to be devoted is of a public or private character, courts will not undertake to disturb its judgment in this

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ver R. L. & C. v. Union Pac. Ry. Co., 34 F. 386; Pittsburg, W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710; 8 S. E. 453.

In Virginia it was held that the necessity for the acquisition of land by the state for any asylum is not a subject of judicial cognizance, but belongs exclusively to the legislative department. Tait's Ex'r v. Central Lunatic Asylum, 84 Va. 271; 4 S. E. 697.

The taking may be defeated by showing that it is not necessary, though the use be unquestionably public. City of Detroit v. Daly, 68 Mich. 503; 37 N. W. 11.

If the general purpose be public, the right cannot be defeated by showing a devotion of the property taken to private uses, as where a small space in stations of an elevated railroad was used for news stands. In re Metropolitan E. Ky. Co., 2 N. Y. S. 278.

A charge as follows: "The fact that some other company had ample terminal and depot grounds was no reason why the plaintiff should not condemn such lands described in the complaint, as the jury should find to be necessary for the construction and operation of its roads," is not erroneous. California Cent. Ry. Co. v. Hooper, 76 Cal. 404; 18 P. 599.

Educating the public, by exhibiting artistic, mechanical, agricultural, and horticultural products, held to be a public use under Act. Pa., June 14th, 1887. Appeal of Rees (Pa.), 12 A. 427.

As to what constitutes public use by improvement company. Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., 70 Wis. 635; 35 N. W. 529.

By railroad company; Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co., 72 Mich. 206; 40 N. W. 436; Flint & P. M. R. Co. v. Board of Railroads Crossings, Id. 448; In re Niagara Falls & W. Ry. Co., 108 N. Y. 375; 15 N. E. 429; Rochester, H. & L. R. Co. v. Babcock, 110 N. Y. 119; 17 N. E. 678.

A canal constructed by a lumber company to carry lumber to a city and supply the city with water, is a public use, for which a right of way may be taken under Const. Or., art. 1, sec. 18. Dalles Lumbering Co. v. Urquhart, 16 Or. 67; 19 P. 78.

A statute provides that subject to its provisions the right of eminent domain might be exercised "in behalf of the following public uses: . . . . outlets, natural or otherwise, for the flow, deposit, or conduct of tailing or refuse matter from mines."

Plaintiff had sought to proceed under this statute to procure condemnation of certain lands belonging to the defendants to serve as a site for a bed rock flume to carry the dirt and gravel from its mining claims and also as a place of deposit for the tailing and refuse matter from its claims. It was not even pretended that any public interest was to be served or that any other person than the plaintiff was to be benefited from the structure when completed. The court said, "It was clear that this case does not come within the meaning of that

regard. But when there was no foundation for pretense that the public was to be benefited by the appropriation, it would be the duty of the court to interfere and afford relief.[1] The fact that the State derives an advantage from the proposed condemnation can never render the use private.[2] But it was admitted in one case that a case might be presented in which it would appear beyond all possibility of question that the property of a citizen had been taken for a use or purpose in no sense public.[3]

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clause of the Constitution which permits the taking of private property for a public use after just compensation made." Consolidated Channel Co. v. C. P. R. R. Co., 51 Cal. 269, per NILES, J. See also Tyler v. Beacher, 44 Vt. 648; Northern Central Coal Co. v. Coal and Iron Co., 37 Md. 537; Parham v. Justices, 9 Ga. 341; Anderson v. Turbeville, 6 Coldw. 419; Sadler v. Langham, 34 Ala. 311. Where plaintiff, a private corporation, sought to condemn, for the purpose of enabling it to work two mines by it, an intervening claim owned by the defendant and a tunnel therein constructed for his private use, it was held that the proposed use was private, and the proceeding was invalid. Amador Queen Min. Co. v. Dewitt, 73 Cal. 482; 15 P. 74. See also Sholl v. German Coal Co. (Ill.), 10 N. E. 199; City of Savannah v. Hancock, 91 Mo. 54; 3 S. W. 215.

1 A railroad company incorporated under a statute making it a common carrier is not rendered a private enterprise so as to deprive it of the right of eminent domain by the fact that it is poorly constructed and terminates at a coal mine belonging to the corporation, when it appears that it carries the mails, passengers, and freights, runs regular trains, and has expended a large amount of money in building its road and acquiring its right of way. Colorado Eastern Ry. Co. v. Union Pac. Ry. Co., 7 Ry. & Corp. L. J. 373. The court, per PHILLIPS, J., after reviewing the evidence and noticing the defense, that the corporate enterprise could not be considered public, nor the appropriation a public use, said: "Its beginning may have been small; but if the right to exercise eminent domain should have been denied in the early history of railroads in this country because of their small beginning, it is not too much to say that some of the great mammoth railroad enterprises which have developed and strengthened the commerce and wealth of the country would have perished in their infancy." In re Railroad Co. v. Moss, 23 Cal. 324, the court say: "It is urged that the plaintiffs are constructing a railroad from a coal mine in the mountains through a desolate region to navigable waters to enable it to get coal ready to market, and that this is a mere private use, and that therefore they have no right to appropriate the property of others to its purposes without their consent. . . . The plaintiffs in common with other railroad companies organized under this act are bound by these provisions which make it obligatory upon them to act as common carriers." See also Chicago & N. W. R. Co. v. Chicago & E. R. Co., 112 Ill. 601; Ward v. Railroad Co., 119 Ill. 287; Mills, Em. Dom., § 14; De Camp v. Railroad Co., 47 N. J. Law, 44.

2 Moore v. Sanford, 151 Mass. 285; 24 N. E. 323.

3 Stockton & V. R. R. Co. v. Stockton, 41 Cal. 147. See also, Lorenz v. Jacob,

§ 252. Consideration of the question of public use with reference to particular corporations.—A correct rule in regard to the status of railroads, with respect to the right of resorting to the power of eminent domain is thus stated: "As far as the public is concerned, when what railroad corporations need is for 'public use,' they have the right to invoke the exercise of eminent domain, but, in as far as that which concerns them as to their private interests, their profits and gains is concerned they stand as individuals, or merely as private corporations, in which the public has no concern, and for such private purposes cannot call into exercise the power of eminent domain."[1] An act providing for condemnation of land for private ways is contrary to the Indiana Constitution.[2] But not in California, where the term "private road" as used in the Political Code,[3] designates a particular kind of public road.[4]

The necessary purpose of a water company formed to supply a city with water constitutes a public use,[5] as does the construction of a switch so as to connect a railroad company's main line with the factory of a single corporation.[6] And the erection of poles,

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63 Id. 73; Cummins v. Peters, 56 Id. 593; Contra, Costa R. R. Co. v. Moss, 23 Cal. 324; Sherman v. Buick, 32 Cal. 240; People v. Pittsburg R. R. Co., 53 Cal. 694.

[1] P. W. & K. R. Co. v. Benwood Iron Works, 31 W. Va. 710.

The question whether the use is public or private depends upon the right of the public to use the road and to require the corporation, as a common carrier, to transport freight or passengers over the same, and not upon the amount of business. Kettle River R. Co. v. Eastern Ry. Co., 41 Minn. 461; 43 N. W. 469.

The construction of a curve by an elevated railway so as to make connection between two of its own distinct lines is a public use for which private property may be taken. In re Union E. R. Co., 113 N. Y. 275; 21 N. E. 81.

[2] Logan v. Stogdale, 123 Ind. 372; 24 N. E. 135.

[3] Sec. 2692.

[4] Following Sherman v. Buick, 32 Cal. 241; Monterey County v. Cushing, 83 Cal. 507; 23 P. 700.

[5] In re New Rochelle Water Co., 46 Hun, 525.

[6] Chicago B. & N. Ry. Co. v. Porter, 43 Minn. 527; 46 N. W. 75.

and the stringing of wires, by a telegraph company, along such highway, is an additional servitude, and constitutes a taking of private property for public use.[1]

The public use for which property is taken is more supposable than real in many instances. In nearly every case there is a mingling of private with the public benefit derived from the exercise of the power. Thus in the case of railroads, which is perhaps the greatest public use to which property is devoted, upon its acquisition by a private corporation, private gain to the company is inseparable from the public interest. While the use is public the ownership and emolument are strictly private. The same may be said of turnpikes, bridges, ferries and canals, whether made by individuals or corporations; they are private property though their use is public.[2]

§ 253. **When the public purpose and necessity must be plain.**—When a condemnation of land is sought on account of a prospective increase in the business of a railroad company it should affirmatively appear beyond all reasonable doubt that such increase will occur in order to justify the taking. If there is any room to suspect that the property is not needed for enlarged

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1 Western Union Tel. Co. v. Williams, 86 Va. 696; 11 S. E. 106.

An act which authorizes the borough of Wilkes Barre to buy a certain tract of land formerly used as a graveyard, and directs that before the borough should sell any part of such land it should convey a certain portion of it to the "Wyoming Historical and Geological Society, for the erection of a hall" for such society, is not unconstitutional, as taking private property for private use, and a deed thereunder is valid. City of Wilkes Barre v. Wyoming Historical and Geological Society, 134 Pa. St. 616; 19 A. 809.

2 Olcott v. Supervisors, 16 Wall. 678. A railroad company cannot legally vest in a telegragh company an exclusive right of its roadway for the establishment of telegraphic lines along the line of the road. In the first place, being an attempt to create a monopoly, it is a perversion of its franchise; and secondly, it is an unauthorized employment of property condemned to public use. Western Un. Tel. Co. v. Am. Un. Tel. Co., 65 Ga. 160.

accommodations but is intended for speculative purposes or to exclude competition by competing lines or to promote undertakings which, though remotely connected with the main enterprise are yet collateral to it, the demand should be refused.[1] So where one corporation is in the occupation and enjoyment of property acquired in the exercise of the power of eminent domain or holds it for public use, it requires statutory authority or necessary implication therefrom to enable another corporation to take it under the power ; and the implication does not arise if the express powers can be exercised without such appropriation.[2] It must appear that the public convenience being equally served, the financial interests of the second company will gain more thereby than the first company would probably be injured.[3] The same proceedings are had for con-

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1 Rensselaer & Saratoga R. R. Co. v. Davis, 43 N. Y. 137. See Stevens v. Erie R. R. Co., 21 N. J. Eq. 259.

2 Matter of Boston A. R. Co., 53 N. Y. 574; Springfield v. Connecticut R. Co., 4 Cush. 63; Little Miami, etc., R. R. Co. v. Dayton, 23 O. St. 510; State v. Montclair R'y Co., 35 N. J. L. 328; Cleveland & P. R. R. Co. v. Speer, 56 Pa. St. 325; Northern R. R. Co. v. Concord & C. R. R. Co., 27 N. H. 183; Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co., 82 Ala. 297; 2 So. 710. And in Appeal of Sharon, 122 Pa. St. 533, it was held that necessity must in the case of a railroad company seeking to take the property of another, be one arising from the very nature of things, over which the company has no control itself, for the sake of convenience or economy, unless there be expressed or necessarily implied statutory permission. See also, Barre R. Co. v. Montpelier & W. R. R. Co., 61 Vt. 1; 17 A. 923.

3 Mobile & G. R. Co. v. Ala. M. R. Co., 87 Ala. 501. See also, Appeal of Sharon Railway, 122 Pa. St. 533; United New Jersey Railroad & Canal Co. v. National Docks & N. J. J. C. Ry. Co. (N. J.), 18 A. 574; Valparaiso v. Chicago & G. T. Ry. Co. (Ind.), 24 N. E. 294; Appeal of Pittsburgh Junction R. Co. (Alleghany Val. R. Co. v. Pittsburgh Junction R. Co.), 122 Pa. St. 511; 6 A. 564; American Tel. & Tel. Co. v. Smith (American Tel. & Tel. Co. v. Pearce), 71 Md. 535; 18 A. 910.

But land which is owned by a railroad company, and which it expects at some future time to use for railroad purposes, but which it has held for five years without using it in any way, is subject to condemnation for the right of way of another company. Colorada E. Ry. Co. v. Union Pac. Ry. Co., 41 F. 293.

The yard occupied by one railroad company, though it may be larger than necessary for its present use, if it is reasonably necessary for its future needs,

demnation of right of way of another company as in other cases.[1] When the right is denied equity will enjoin the company from appropriating the property of another until the question is passed upon.[2]

§ 254. **Due process of law.**—What constitutes "due process of law" is a very broad and far-reaching inquiry in any case. It involves a consideration of the constitutional provisions requiring recourse to it wherever and whenever the right to deprive a citizen of his property for any purpose public or private is made an issue.

The requirement is satisfied in the case of appropriation for public use if proceedings are regularly had before an impartial tribunal constituted by law and the prescribed methods of procedure are observed before it in fixing the measure of compensation and in taking and appropriating and paying for the property. "The right to appropriate private property to public uses lies dormant in the State until legislative action is had, pointing out the occasions, the modes, conditions and agencies for its appropriation."[3] But a legislative enactment is the "law of the land" and a provision in an Act of Congress that any person injured by an appropriation may apply to the court of claims for indemnity gives "due process of law."[4] And it is

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cannot be taken in part by another company for its use. Appeal of Pittsburgh Junction R. Co. (Alleghany Val. R. Co. v. Pittsburgh Junction R. Co.), 122 Pa. St. 511; 6 A. 564. As to the right of telegraph companies to construct their lines over military and post roads under Rev. Stat. U. S. sec. 526. See American Tel. & Tel. Co. v. Smith (American Tel. & Tel. Co. v. Pearce), 71 Md. 535; 18 A. 910.

[1] Toledo, A. A. & N. M. Ry. Co. v. Detroit, L. & N. R. Co., 29 N. W. 500, 506; 62 Mich. 564, 578.

[2] Montana, etc., R. Co. v. Helena, etc., R. Co., 6 Mont. 416; 12 P. 916.

[3] Cooley on Const. Lim., 5th Ed., p. 653, citing Barrow v. Page, 5 Hayw. 97; Railroad Co. v. Lake, 71 Ill. 333; Allen v. Jones, 47 Ind. 438.

[4] Great Falls Manuf'g Co. v. Garland, 124 U. S. 581; 8 S. Ct. 631.

held that where no remedy is given by statute, if the common law remedy be not taken away but expressly recognized in the State constitution this requirement is not violated.[1] It is held that the right to insist upon due process of law may be cut off by statute of limitations.[2] The requirement is fulfilled by the appointment of commissioners to assess the damages and giving a right of appeal from their award.[3] And it was held in one case[4] that the act under which they act need not make provision for notice to the owner of the time and place of meeting of the commissioners to assess the compensation, nor secure him any hearing in relation thereto. A party may have the taking of his property without due process of law, and without just compensation enjoined.[5]

§ 255. **Prescribed methods must be strictly pursued.**— When, however, the occasion, the conditions and the manner of the taking have been declared and pointed out, these must in all respects be strictly observed and complied with; and unless this is done the proceeding will be of no effect.[6]

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[1] Appeal of Rees (Pa.), 12 A. 427.

[2] Miller v. Town of Corinna, 42 Minn. 391; 44 N. W. 127. Compare Yazoo & Mississippi Delta Levee Board v. Dancy (Miss.), 3 So. 568.

[3] Cherokee Nation v. So. Kan. Ry. Co., 135 U. S. 641; 10 S. Ct. 965.

[4] Wilson v. Baltimore, 5 Del. Ch. 524.

[5] American Tel. & Tel. Co. v. Smith, 71 Md. 535; 18 A. 910. Appeal of Tyrone Township School-District (Pa.), 15 A. 667. A railroad company seeking to acquire a right of way through the streets of a city has no vested rights which entitle it to a judicial investigation by due process of law, other than such as the legislature may have provided. Fort Street Union Depot Co. v. State Railroad Crossing Board (Mich.), 45 N. W. 973. See also Cherokee Nation v. So. Kan. R. Co., 135 U. S. 641.

[6] Chicago, etc., R. Co. v. Smith, 68 Ill. 96; Dalton v. Water Commissioners, 49 Cal. 223; Stockton v. Whitmore, 50 Cal. 554; Supervisors of Doddridge v. Stout, 9 W. Va. 703; Power's Appeal, 29 Mich. 504; Kropp v. Forman, 31 Mich. 144; Arnold v. Decatur, 29 Mich. 77; Lund v. New Bedford, 121 Mass. 286; Bohlman v. Green Bay, etc., R. R. Co., 40 Wis. 157; Moore v. Railway Co., 34 Wis. 173; Decatur County v. Humphreys, 47 Ga. 565; Commissioners v. Beckwith, 10 Kan. 603.

With regard to compliance with the provisions of the law, they are in the nature of conditions precedent to a right of disturbing the property, and such compliance must be affirmatively shown to support a title in the party claiming under the adverse proceeding. If, for instance, the statute provides that the damage for the taking shall be assessed by disinterested freeholders of a municipality, the proceedings will be invalid unless they show that the appraisers were such freeholders and inhabitants.[1]

And if the statute requires that prior to the institution of the proceedings *in invitum* there shall be an effort to agree with the owner on the compensation to be paid, the attempt to come to such agreement and its failure must appear.[2] Not only the persons holding the legal title and in possession, but mortgagees are entitled to notice.[3] But judgment creditors of the owner are not,[4] nor is a mere trustee of an equitable interest in the land.[5] Notice to the owner of private property proposed to be taken where he can be found is indispensable; but if he cannot be found or be known, general notice to all parties interested should be given.[6]

The occasions, uses, and proceedings in the exercise of eminent domain are to a great extent matters of con-

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[1] Judson v. Bridgeport, 25 Conn. 426; People v. Brighton, 20 Mich. 57; Moore v. Railway Co., 34 Wis. 173.

[2] Ellis v. Pacific R. R. Co., 51 Mo. 200; Reitenbaugh v. Chester Valley R. R. Co., 21 Penn. St. 100; West Va. Transportation Co. v. Volcanic Oarland Coal Co., 5 W. Va. 382, 200; United States v. Reed, 56 Mo. 565. But where it appears that the party whose land was sought to be condemned had filed a petition for a jury to assess the damages, it was held that it dispensed with the attempt to come to an agreement. Burt v. Bringham, 117 Mass. 307.

[3] Severin v. Cole, 38 Ia. 463; Martin v. London, etc., Co., L. R. 1 Eq. 145.

[4] Watson v. N. Y., etc., R. R. Co., 47 N. Y.

[5] McIntyre v. Easton, etc., R. R. Co., 26 N. J. Eq. 425.

[6] Chicago, etc., R. R. Co. v. Smith, 78 Ill. 96; Hildreth v. City of Lowell, 11 Gray, 345; Lohman v. St. Paul, etc., R. R. Co., 18 Minn. 174. But see Anderson v. Tebeville, 6 Cold. (Tenn.), 150; Grand Rapids, etc., R. R. Co. v. Alley, 34 Mich. 16, 18.

stitutional cognizance and statutory regulation in each state, except where property is taken by the national government for public buildings, forts, arsenals, and the like, or where it has created corporations, and conferred upon them the power and prescribed the terms and formalities to be complied with and observed in its exercise.[1]

§ 256. When and what compensation to be made.—The owner of land is not entitled to compensation for incidental damages resulting from public improvements made by the State, especially when such damages were suffered long subsequently to the making of the improvement.[2] A homesteader who has entered, and is proceeding lawfully to perfect his title to the land entered has suffered an injury by the bulding of a railroad over his homestead which differs only in degree from that sustained from the same cause by one who has the complete title.[3]

So where a railroad company built its road over public lands, the subsequent patentee of such is entitled to the value of the land taken by the company, exclusive of the improvements made by it.[4]

In determining the question of just compensation, not only the fair value of the land actually taken should be considered, but depreciation of the owner's remain-

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[1] Proceedings in regard to eminent domain, according to § 1243 Code Civ. Proc. Cal., must be brought in the superior court of the county in which the property is situated, but as there is no law in California defining what is the place of residence of a corporation, § 395 Civ. Code has no application to a proceeding to condemn the lands of a corporation. Cal. So. R. Co. v. So. Co. v. So. Pac. R. Co., 65 Cal. 394; 4 P. 344.

[2] Lamb v. Reclamation Dist. No. 108, 73 Cal. 125; 14 P. 625, THORNTON, J., dissenting. Hoagland v. State, (Cal.) 22 P. 142.

[3] Burlington, K. & S. W. R. Co. v. Johnson, 38 Kan. 142; 16 P. 125. See also Ellisworth, M. N. & S. E. R. Co. v. Gates, 41 Kan. 574; 21 P. 632.

[4] Denver & R. G. W. Ry. Co. v. Stancliff, 4 Utah, 117; 7 P. 530.

ing property in point of utility and convenience may be taken into account.[1]

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[1] The abutting owner of the fee of a county road constructed at the expense of the landowner is entitled to compensation for its use by a natural gas company for its pipes; and a license by the county board of commissioners to the company to lay its pipes in the road only, conveys the right of the county in the highway, but does not affect private property rights. Kincaid v. Indianapolis Natural Gas Co., 124 Ind. 577; 24 N. E. 1066.

A railroad which constructs its road beside a highway is liable to the owner of a farm on the opposite side of the highway for depreciation in the value of his farm caused by the construction and operation of the road so near the highway as to render it unsafe, and to make access to it from the farm with teams and stock more dangerous. Lake Erie & Western R. Co. v. Scott (Ill.), 24 N. E. 78.

The reservation by a mining company of the right to lay railroad tracks for the transportation of ore in the streets of an addition to a city platted by it, confers no right upon the railroad company, its grantee in the premises, to use such streets for general railroad purposes, without compensation to the adjoining lot-owners. Redinger v. Marquette & W. R. Co., 62 Mich. 29; 28 N. W. 775; Ward v. Detroit, M. & M. R. Co., 62 Mich. 46; 28 N. W. 785.

Under Const. Tex. 1876, art. 1, sec. 17, providing that property shall not be taken or damaged for public use without just compensation, a railroad company cannot convey to another company part of the interest in land which it has acquired by purchase of a right of way, so as to enable the latter company to build and operate an additional road over such right of way, without the consent of the owner of the fee, unless by condemnation proceedings. Ft. W. & G. Ry. Co. v. Jennings, 76 Tex. 373.

A railroad company which has raised the grade of a street on which its road is built to a point within a few inches of the sidewalk, but not quite as high as the grade of its track, is not liable therefor to the owner of property fronting on such street, where it appears that the raising of the grade of the track is not high enough to obstruct the access to such property. Jackson v. Chicago S. F. & C. Ry. Co., 41 F. 656.

Where a railway corporation locates its road on a street under the provisions of statute, in such proximity to the premises of an adjoining lot-owner that its use obstructs his communication with the street, and interferes with its enjoyment by those who occupy the premises to such an extent as to materially depreciate their value, the lot-owner is entitled to recover the amount of such depreciation. McQuaid v. Portland & N. Ry. Co., 18 Or. 237.

Where the junction of two streets is occupied by a diagonal railway crossing, the abutting owner of a corner lot is entitled to compensation. Enos v. Chicago, St. P. & K. C. Ry. Co., 78 Iowa, 28; 42 N. W. 575.

Obstruction of streets during construction is not an injury to the property, within the statute, from which a cause of action necessarily arises, as the use of the street is incidental to the improvement, though if the obstruction is unreasonably prolonged, the specific damages resulting therefrom may be recovered. Shepherd v. Baltimore & O. R. Co., 130 U. S. 426; 9 S. Ct. 598. See also Beck v. Railway Co., 65 Miss. 172; Tyler v. Town of Hudson, 147 Mass. 609.

Where the title of the owners in fee of lots abutting upon a street extends to the middle of the street, subject to the public use as a street, such owners are entitled to compensation upon the construction of a railroad through the street.[1] And in such case the construction of a second track along the same

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And when the obstruction is permanent, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress and egress to and from them. Kansas N. & D. Ry. Co. v. Cuykendall, 42 Kan. 234; 21 P. 1051. Compare Trinity & S. Ry. Co. v. Meadows (Tex.), 11 S. W. 145.

In such case the company is liable, although the railroad is skillfully and properly constructed, and plaintiff's lots are accessible from another street. Ft. Scott W. & W. Ry. Co. v. Fox, 42 Kan. 490; 22 P. 583. Compare Iron Mountain R. R. Co. v. Bingham, 3 Pickle (Tenn.), 522; 11 S. W. 705; Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co., 97 Mo. 457; 10 S. W. 826; Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370; 21 P. 276; Chicago, K. & N. Ry. Co. v. Andrews, 41 Kan. 370; 21 P. 276.

And the company is not protected from responsibility by showing corporate authority for the work. Griffin v. Shreveport & A. R. Co., 41 La. 808; 6 So. 624.

[1] Gray v. First Division of St. Paul, etc., R. Co., 13 Minn. 315; Stetson v. Chicago, etc., R. R. Co., 75 Ill. 74; Cox v. Louisville, etc., R. R. Co., 48 Ind. 178; Jewett v. Union, E. R. Co., 1 N. Y. S. 123. See also, Egerer v. New York Cent. & H. R. R. Co., 2 N. Y. S. 69. Following Langdon v. Mayor, 93 N. Y. 129, and Williams v. Same, 105 N. Y. 419; 11 N. E. 829; Kingsland v. Mayor, 110 N. Y. 569; 18 N. E. 435; City of Chicago v. Taylor, 8 S. Ct. 820; Northern Cent. Ry. Co. v. Holland (Pa.), 12 A. 575; Adams v. Chicago, B. & W. S. Co., 39 Minn. 286; 39 N. W. 629; Campbell v. Metropolitan St. R. Co., 82 Ga. 320; 9 S. E. 1078; Spofford v. Southern Boulevard R. Co., 22 N. E. Rep. 246; 4 N. Y. S. 388; Shepherd v. Baltimore & O. R. Co., 9 S. Ct. 598; Mortimer v. New York El. R. Co., 6 N. Y. S. 898; Hine v. Same, 27 N. Y. St. Rep. 303; 7 N. Y. S. 464; Stevens v. New York El. R. Co., 8 N. Y. S. 313; 57 N. Y. Super. Ct. 416; East End St. Ry. Co. v. Doyle, 88 Ten. 747; 13 S. W. 936; Central Land Co. v. City of Providence, 15 R. I. 246; 2 A. 553; American Tel. & Tel. Co. v. Smith (American Tel. & Tel. Co. v. Pearce), 71 Md. 535; 18 A. 910; East End W. Ry. Co. v. Doyle, 88 Tenn. 747. Following Lohr v. Railroad Co., 10 N. E. Rep. 528; 104 N. Y. 268; Third-Ave. R. Co. v. New York El. R. Co., 19 Abb. N. C. 261; Trustees of First Congregational Church v. Milwaukee & L. W. Ry. Co. (Wis.), 45 N. W. 1086; Gilbert v. Grealy, S. L. & P. Ry. Co., 13 Colo. 501; Muller v. O. P. B. R. Co., 86 Cal. 240.

A person who has occupied and improved property outside of a city has a right to be reimbursed in damages, where the city has subsequently extended its limits, and, in grading a street made necessary by such extension, has knocked down his fences, and caused surface water to overflow his property, and injure his cellar, walls, and shrubbery. Gray v. City of Knoxville, 85 Tenn. 99.

street constitutes a new and distinct servitude entitling the owners to additional compensation.[1] And although the fee be in the city, an unusual use of it by a railroad company, such as converting it into a place for the deposit and storage of cars, to the injury of adjoining owners, will entitle them to compensation for special injury resulting from such use.[2]

§ 257. **Same with reference to time of payment.**—Only the damages for injuries caused by actual appropriation are to be paid in advance.[3] Payment in advance cannot be required when property is taken under act of congress, the constitutional provision only requiring adequate provision to be made for the owner's obtaining compensation.[4] Payment into court is a sufficient compliance with a constitutional provision requiring payment of compensation or damage in advance.[5] But if no tender is made until after appeal by the landowner, no possession of the land can be taken until a tender is made of the amount found by the jury.[6] Until what is just compensation has been ascertained in the manner directed by law, and the condemnation money paid, either actually or constructively, it is not within the power of the legislature to dispossess the landowner and put another

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1 Southern Pac. R. Co. v. Reed, 41 Cal. 256.

2 Mahody v. Bushwick R. R. Co., 91 N. Y. 148.

3 Lorie v. North Chicago City Ry. Co., 32 F. 270.

4 Reversing 33 F. 900. Cherokee Nation v. Southern Kan. Ry. Co., L. 135 U. S. 641; 10 S. Ct. 965.

5 McClain v. People, 9 Colo. 190; 11 P. 85; Ackerman v. Huff, 71 Tex. 317; 9 S. W. 246. Otherwise where required to be fixed by jury; Porter v. Pacific Coast Ry. Co. (Cal.), 18 P. 428; Asher v. Louisville & N. R. Co., 87 Ky. 391; 8 S. W. 854; Covington S. R. T. Ry. Co. v. Peil, 87 Ky. 267; 8 S. W. 449.

6 Johnson v. Baltimore & N. Y. Ry. Co., 45 N. J, Eq. 454; 17 A. 574. See also Ackerman v. Huff, 71 Tex. 317; Asher v. Railroad Co., 87 Ky. 391; Covington S. R. T. Ry. Co. v. Piel, Id. 267. As to proper practice under Cal. Stat., see San-Diego Land & Town Co. v. Neale, 78 Cal. 80; 20 P. 380.

person in possession of his land.[1] And in case of a railroad company seeking to build a track upon a street it is immaterial that the assent of the city has been obtained, and that the railroad company has given bond to protect the city.[2] The fact that a court refuses to enjoin a railroad company from taking possession of land before condemnation and payment of compensation, does not legalize the possession so taken nor relieve the company from an action at law for the wrongful entry.[3] But when the proceeding was by a municipal corporation for the purpose of abating a nuisance, it was held that under the act authorizing such taking the title vested in the city though no compensation was made in advance, it being an exercise of police power.[4]

§ 258. **Competency of evidence of damage.**—All evidence which tends to enlighten the jury as to value of the property both before and since the appropriation and as to resulting inconvenience and use of the same by reason thereof, should be admitted.[5]

Evidence should not be allowed as to the damage per acre, without definite proof as to the number of

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1 Johnson v. Baltimore & N. Y. Ry. Co., 45 N. J. Eq. 454; 17 A. 574.

2 Appeal of Beilder, 23 W. N. C. 415; 17 A. 244.

3 Grand Rapids, L. & D. R. Co. v. Cheseboro, 74 Mich. 466; 42 N. W. 66.

4 Sweet v. Rechel, 37 F. 322. A tender of payment of compensation as previously ascertained by commissioners and refusal to accept the same satisfies the requirements of a statute requiring payment of compensation in advance. Johnson v. Baltimore & N. Y. Ry. Co., 45 N. J. Eq. 454; 17 A. 574.

5 See Little Rock Junction Ry. V. Woodruff, 49 Ark. 381; 5 S. W. 792; Pennsylvania S. & V. R. Co. v. Keller (Pa.), 11 A. 381; Kiernen v. Chicago, S. F. & C. R. Co., 123 Ill. 188; 14 N. E. 18; Sawyer v. City of Boston, 144 Mass. 470; 11 N. E. 711; Pittsburgh, V. & C. Ry. v. Vance, 115 Pa. St. 325; 8 A. 764; Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co., 121 Ill. 199; 12 N. E. 536; Centralia & C. R. Co. v. Rixman, 121 Ill. 214; 12 N. 685; E. Chicago, E. & L. S. R. Co. v. Catholic Bishop, 119 Ill. 525; 10 N. E. 372.

acres involved.[1] Whenever any matter is an element of damage or compensation, evidence concerning it is admissible. These matters are of almost infinite character. The noise produced by passing trains is a

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[1] Bail v. Keokuk & N. W. Ry Co., 71 Ia. 306; 32 N. W. 354. Amount of damages in the case of mining prospects need not necessarily be based upon rules of the same or similar property. Montana Ry. Co. v. Warren (Mont.), 12 P. 64.

See, generally, County of Smith v. Labore (Kan.), 15 P. 577; Weyer v. Chicago, W. & N. R. Co., 68 Wis. 180; 31 N. W. 710; In re City of Grand Rapids v. Grand Rapids & I. R. Co., 66 Mich. 42; 33 N. W. 15; Pittsburgh V. & C. Ry. Co. v. Vance, 115 Pa. 325; 8 A. 764; Johnson v. Chicago B. & N. R. Co., 37 Minn. 519; 35 N. W. 438; Cedar Rapids, I. F. & N. Ry. Co. v. Ryan, 36 Minn. 546; 33 N. W. 35; Chicago E. & L. S. R. Co. v. Catholic Bishop, 119 Ill. 525; 10 N. E. 372; Oregon Ry. & Nav. Co v. Mosier, 14 Or. 519; 13 P. 300; Barnes v. Michigan Air-Line Ry., 65 Mich. 251; 32 N. W. 426; Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350; 31 N. W. 281; Ward v. Minnesota & N. W. R. Co., 119 Ill. 287; 10 N. E. 365; New Orleans & G. R. Co. v. Frank, 39 La. 707; 2 So. 310; Ohio Val. Ry. & Min. Co. v. Thomas (Ky.), 5 S. W. 470; Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co., 121 Ill. 199; 12 N. E. 536; Ohio Val. Ry. & Min. Co. v. Kuhn (Ky.), 5 S. W. 419; Henry v. Centralia & C. R. Co., 121 Ill. 264; 12 N. E. 744; Owens v. Missouri Pac. Ry. Co., 67 Tex. 679; 4 S. W. 593; Tyler v. Town of Hudson; 147 Mass. 609; 18 N. E. 582; Covington S. R. T. Ry. Co. v. Piel, 87 Ky. 267; 8 S. W. 449; Dickinson County v. Hogan (Kan.), 18 P. 611; Kingsland v. Mayor, 110 N. Y. 569; 18 N. E. 435; Wabash St. L. & P. Ry. Co. v. McDougall, 126 Ill. 111; 18 N. E. 291; Omaha Horse Ry. Co. v. Cable Tramway Co., 32 F. 727; Centralia & C. R. Co. v. Brake, 125 Ill. 393; 17 N. E. 820, DWIGHT, J., dissenting; In re New York, L. & W. Ry. Co., 2 N. Y. S. 478.

[2] See Wichita & W. R. Co. v. Kuhn, 38 Kan. 104; Redmond v. St. Paul, M. & M. Ry. Co., 39 Minn. 248; 40 N. W. 64; Centralia & C. R. Co. v. Brake, 125 Ill. 393; 17 N. E. 820; Norfolk & W. R. Co. v. Stephens (Va.), 7 S. E. 251; Eslick v. Mason City & Ft. D. Ry. Co., 75 Iowa, 443; 39 N. W. 700, Tallman v. Metropolitan E. R. Co., 2 N. Y. S. 130; Calumet R. Ry. Co. v. Moore, 124 Ill. 329; 15 N. E. 764; Brown v. Calumet River Ry. Co., 125 Ill. 600; 18 N. E. 283; Denver & R. G. Ry. Co. v. Schmitt, 11 Colo. 56; 16 P. 842; Leroy & W. R. Co. v. Ross; 40 Kan. 598; 20 P. 197; Ottawa O. C. & G. R. Co. v. Adolph, 41 Kan 600; 21 P. 643; Chicago & A. R. Co. v. Goodwin, 111 Ill. 273; Moore v. New York El. R. Co., 8 N. Y. S. 769; 24 Abb. N. C. 74; Kanakee & S. R. Co. v. Horan, 22 Ill. App. 145; Mooney v. New York El. R. Co., 9 N. Y. S. 522; Woolsey v. New York El. R. Co., 56 Hun, 642; Burlington & M. R. Co. v. White (Neb.), 44 N. W. 95; Doyle v. Manhattan Ry. Co., 29 N. Y. St. Rep. 139; 8 N. Y. S. 324; 24 Abb. N. C. 72; Durham & N. R. Co. v. Trustees of Bullock Church, 104 N. C. 525; 10 S. E. 761; holding that where a railroad has condemned part of a church property, it is competent for the purpose of proving that the value of the residue was impaired as church property by the location and use of the road, to show that horses could not be left on the grounds, on

proper element to be considered in estimating the damages.[1] The expense incident to removal from land taken by a railway company under condemnation pro-

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account of passing trains, and that people would not go to the church to worship, as they were disturbed by the same causes. Baltimore & P. R. Co. v. Sloan, 131 Pa. St. 568; 25 W. N. C. 199; 18 A. 903. Following In re Railroad Co., 8 N. Y. S. 78; In re Union El. R. Co., 8 N. Y. S. 813; Muller v. Southern Pac. B. Ry. Co., 83 Cal. 240; 23 P. 265; Geissinger v. Borough of Hellertown, 19 A. 412; 133 Pa. St. 522; Pittsburgh B. & B. R. Co. v. McCloskey, 110 Pa. St. 436; 1 A. 555; Kenkele v. Manhattan Ry. Co., 55 Hun, 398; 8 N. Y. S. 707; Central Land Co. v. City of Providence, 15 R. I. 246; 2 A. 553; Toledo A. A. & N. M. Ry. Co. v. Detroit L. & N. R. Co., 62 Mich. 564, 578; 29 N. W. 500, 506; Hooker v. Montpelier & W. R. R. Co. (Vt.), 19 A. 775; Rees v. Schuylkill River E. S. R. Co., 135 Pa. St. 629; 20 A. 149; Fort North & N. O. Ry. Co. v. Pearce, 75 Tex. 281; 12 S. W. 864; Larsen v. Oregon Ry. & Nav. Co. (Or.), 23 P. 974, holding that the true and actual value of the property or interest therein belonging to the defendant at the time of the appraisemen is the measure of compensation in condemnation proceedings in Oregon. Colorado Cent. R. Co. v. Allen, 13 Colo. 229; 22 P. 605. See also City of Omaha v. Kramer (Neb.), 41 N. W. 295; Chicago K. & N. Ry. Co. v. Hazels (Neb.), 2 N. W. 93.

In assessing damages for right of way for a railway, it is proper to consider the manner in which the road cuts the land, the excavations and embankments, and the exposure of the property to particular injuries from the proximity of the road which may result from its proper construction and operation. Railroad Co. v. Hays, 15 Neb. 224; 18 N. W. 51; Fremont E. & M. V. R. Co. v. Meeker (Neb.), 44 N. W. 79.

There being no evidence that a demand was ever made on a railroad company occupying a street to level the bed of its road and the tops of the rails, it will be presumed, from long acquiescence, that the track was laid as was intended, and an abutting lot-owner cannot recover damages for such alleged defect. Merchants' Union Barb Wire Co. v. Chicago R. I. & P. R. Co. (Iowa), 44 N. W. 900.

Plaintiff, the owner of a fee in premises abutting on the line of an elevated road, is entitled to damages for injury to his property by the smoke, cinders, and gas caused by the engines of the road, and which injure the rental value of the property. Abendroth v. New York El. R. Co., 54 N. Y. Super. Ct. 417. See also Stevens v. New York El. R. Co., 8 N. Y. S. 313; 57 N. Y. Super. Ct. 416.

Where a railroad company enters on land expecting to make an arrangement with the owners for its purchase, and lays its tracks thereon, it should not be compelled in condemnation proceedings to pay the owners of the land for the rails. In re Norwood & M. R. Co., 47 Hun, 489. See also Chicago & A. R. Co. v. Goodwin, 111 Ill. 273; Albion R. R. Co. v. Hesser, 84 Cal. 435; 24 P. 288; Searl v. School Dist. No. 2, 133 U. S. 553; 10 S. Ct. 374.

Admissibility of evidence of market value.—See Dowd v. Mason City, etc., R. Co., 76 Iowa, 438.

[1] Ode v. Manhattan Ry. Co., 56 Hun, 199; 9 N. Y. S. 338.

ceedings cannot be considered to increase the damages.[1] Though the company acquires only an easement in the land taken, the owner is entitled to the full value of the fee.[2]

§ 259. **Special value.**—The owner of land taken for railroad purposes may show the special availability of the land as a railroad approach to an established centre of commerce.[3] Where in a proceeding to condemn a site for the landing of a railroad bridge, the land in question possessed peculiar advantages for a bridge, it was held, evidence showing the land in question to be a specially eligible bridge site was properly admitted, as

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[1] Ranlet v. Concord R. Corp., 62 N. H. 561.

A landowner cannot recover the value of his counsel fees as part of his compensation. San Jose & A. R. Co. v. Mayne, 83 Cal. 566; 23 P. 522.

[2] It is not a legitimate element of damage in condemnation proceedings that the railroad company may remove a farm crossing already established, and an instruction allowing consideration of that possibility is error. St. Louis, E. C. & C. Ry. Co. v. North, 31 Mo. App. 345. Following Ireland v. Metropolitan El. R. Co., 52 N. Y. Super. Ct. 460; Taylor v. Metropolitan El. Ry. Co., 55 N. Y. Super. Ct. 555; Reading, etc., R. Co. v. Belthaser, 126 Pa. St. 1; 24 W. N. C. 9.

Rental value.—Testimony that owners of property in the neighborhood of plaintiff's premises had difficulty in renting their flats after the road was built, was competent as tending to show the uniform operation of a general cause, and that plaintiff's loss of rents was not attributable to his neglect. Kuhn v. Metropolitan El. Ry. Co., 9 N. Y. S. 710. See Thompson v. Manhattan Ry. Co., 8 N. Y. S. 641; Woolsey v. New York El. R. Co., 56 Hun, 642; Moore v. New York El. R. Co., 8 N. Y. S. 769; 24 Abb. N. C. 74; McGean v. Manhattan Ry. Co., 117 N. Y. 219; 22 N. E. 957.

Assessed valuation.—Dudley v. Minnesota, etc., R. Co. 77 Iowa, 408; San Jose & A. R. Co. v. Mayne, 83 Cal. 566; Birmingham Mineral R. Co. v. Smith, 89 Ala. 305; 7 So. 634. The sworn assessment list furnished by a landowner to the assessor, giving the market value in money of his land, as required by Code Ala., sections 470–486, is admissible in a proceeding to condemn a right of way across the same land, instituted at about the time the list was made, not merely to discredit the landowner's testimony in the condemnation proceeding, but as independent evidence of the value of the land. Birmingham Mineral R. Co. v. Smith, 89 Ala. 305; 7 So. 634.

For intended use.—Searls, C. J., and McFarland, J., dissenting. San Diego Land & Town Co. v. Neale, 78 Cal. 63; 20 P. 372; Pennsylvania S. V. R. Co. v. Cleary, 125 Pa. St. 442; 17 A. 468.

[3] Currie v. Waverly & N. Y. B. R. Co. (N. J.), 20 A. 56.

affecting the question of its value.[1] As affecting the market value of the property, the fact may be shown that the railroad increases the rate of insurance upon buildings already erected.[2] In proceedings for the condemnation of a mining claim for railroad purposes, the owner may prove the value of the land for town-lot purposes, whether built upon or not, in addition to proving its value for the other purposes.[3]

§ 260. **Various methods of determining compensation.**— The owner of land taken for railway purposes is entitled to the market value of the property at the time of the appropriation. By the market value is meant such a price as the vendor could obtain after ample time taken to effect a sale.[4] Each item of damage or compensation should be considered.[5] Any number of separate parcels of property situate in the same county may be included in one petition, and the compensation for each should be assessed separately, by the same or different juries.[6] Evidence of loss of probable profits of the business conducted on the land to be condemned is

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[1] Little Rock Junction Ry. v. Woodruff, 49 Ark. 391; 5 S. W. 792, holding also that the owner should be allowed to put in evidence all facts which vendor would adduce if he were attempting a private sale.

[2] Cedar Rapids, I. F. & N. W. Ry. Co. v. Raymond, 37 Minn. 204; 33 N. W. 704.

[3] Montana Ry. Co. v. Warren, 6 Mont. 275; 12 P. 641.

[4] Little Rock Junction Ry. v. Woodruff, 49 Ark. 381; 5 S. W. 792. See also, Pittsburgh, V. & C. Ry. Co. v. Vance, 115 Pa. St. 325; 8 A. 674; Sawyer v. City of Boston, 144 Mass. 470; 11 N. E. 711.

[5] Flint & P. M. R. Co. v. Detroit & B. C. R. Co., 64 Mich. 350; 31 N. W. 281.

[6] Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co., 121 Ill. 199; 12 N. E. 536. The general statute law relating to such condemnation proceedings contemplates that such rights of private use of the land taken as are of the nature to interfere with the operation of the railroad shall be determined and defined in the condemnation proceedings, and the landowner has not a reserved right of private crossing, unless so defined. Compensation to the land-owner is to be assessed accordingly. Cedar Rapids, I. F. & N. Y. Ry. Co. v. Raymond, 37 Minn. 204; 33 N. W. 704.

inadmissible.[1] Commissioners appointed to appraise land taken for the purposes of an elevated railroad have a wider range and a larger discretion in the reception of evidence than courts, and unless their award is manifestly unjust it will not be disturbed.[2] The amount of a judgment recovered for entering upon land by a railroad company is the measure of damages, as against its successor.[3] The measure of damages of abutting property, arising from the construction of an elevated railroad in a street, is the difference in the value of the property before and after the construction of the road.[4] The basis of compensation and damages may be fixed by statute.[5] Speculative damages are not to be considered,[6] nor damages to a railroad company resulting from loss of business by reason of competition by a rival

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[1] De Buol v. Freeport & M. R. Co., 111 Ill. 499; In re New York El. R. Co., 8 N. Y. S. 707.

[2] In California it is held that in arriving at the value of the lot, evidence as to the uses to which it may be put is admissible. Muller v. Southern Pac. B. Ry. Co., 83 Cal. 340.

In an action against a street railway company for damages to a lot and dwelling by throwing up an embankment and raising the surface of a street, evidence of the probable cost of constructing retaining walls, and raising the property to the new grade of the street, is admissible. Taylor v. Kansas City C. Ry. Co., 38 Mo. App. 668.

In condemnation proceedings it is error under Code Civil Proc. Cal., sec. 1249, making the value of the land at the date of the summons the measure of damages, to permit a witness to answer as to the present value. San Jose & A. R. Co. v. Mayne, 83 Cal. 566.

Where, after proper proceedings by a railroad company, land has been condemned, title thereto passes to the company, and the only measure of the owner's damages is the amount assessed by the commissioners. Corey v. Chicago, B. & K. C. Ry. Co., 100 Mo. 282.

[3] Rio Grande & E. P. Ry. Co. v. Ortiz, 75 Tex. 602.

The landowner is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof, general benefits not considered. Fremont, E. & M. V. R. Co. v. Meeker (Neb), 44 N. W. 79.

[4] Mortimer v. Manhattan Ry. Co., 57 N. Y. Super. Ct. 509. See also, Muller v. Southern Pac. B. Ry. Co., 83 Cal. 240.

[5] Tait's Ex'r v. Central Lunatic Asylum, 84 Va. 271; 4 S. E. 797. See also, Pennsylvania R. Co. v. Magee, (Pa.) 13 P. 839.

[6] Ellsworth, M. N. & S. E. Ry. Co. v. Maxwell, 39 Kan. 651; 18 P. 819; Schuylkill River, E. S. R. Co. v. Stocker, 24 W. N. C. 455.

line seeking to condemn right of way for crossings, side tracks, etc.[1]

But evidence that the land to be condemned has a special value for railroad purposes beyond its general market value, and that certain prices above the general market value have been offered for it, is admissible.[2]

§ 261. **General principles.**—Permanent depreciation in the value of plaintiff's property cannot be recovered in a common-law action, but he must be limited to a recovery of such temporary damages as have accrued up to the time of the commencement of the action.[3] The jury have the right to consider an entire tract in measuring damages. The jury need not be confined to the tract described in the petition.[4]

But the owner of a farm consisting of distinct parcels of land, separated by land owned by him, and over which he has no private right of way, is not entitled to have such separate parcels treated as one entire tract, for

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1 Omaha Horse Ry. Co. v. Cable Tramway Co., 2 F. 727.

2 Johnson v. Freeport & M. R. Ry. Co., 111 Ill. 413.

3 Following Pond v. Railway Co., 19 N. E. 487; Hussner v. Railroad Co., 21 N. E. 1002; Reming v. New York, L. & W. Ry. Co. 7 N. Y. S. 516.

4 Springfield & S. Ry. Co. v. Calkins (Mo.), S. W. 82. See also, Cedar Rapids, I. F. & N. Ry. Co. v. Ryan, 36 Minn. 546; 33 N. W. 56; Peck v. Superior Short Line Ry. Co., 36 Minn. 343; 31 N. W. 217; Northeastern Neb. Ry. Co. v. Frazier, 25 Neb. 42; 40 N. W. 604; Baltimore & P. R. Co. v. Springer (Pa.), 13 A. 76; Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466; 42 N. W. 66; Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. St. 544; 23 W. N. C. 421; Dudley v. Minnesota & N. W. R. Co., 77 Iowa, 408; Fayetteville & L. R. Ry. Co. v. Hunt, 51 Ark. 324; Chicago, S. F. & C. Ry. Co. v. Vivian, 33 Mo. App. 583; De Buol v. Freeport & M. R. Ry. Co., 111 Ill. 499; Chicago, K. & W. Ry. Co. v. Brunson, 43 Kan. 371.

Witnesses familiar with the land to be condemned may express their opinion as to its value, though they are not experts. Johnson v. Freeport & M. R. Ry. Co., 111 Ill. 413. See also, Roosevelt v. New York El. R. Co., 8 N. Y. S. 547; 57 N. Y. Super. Ct. 438; Curtin v. Nittany Val. R. Co., 26 W. N. C. (Pa.), 161; Railroad Co. v. Arnold, 13 Neb. 485; 14 N. W. 478; Railroad Co. v. Fraizer, 25 Neb. 53, 54; 40 N. W. 609; Burlington & M. R. R. Co. v. White (Neb.), 44 N. W. 95; Pingrey v. Railroad Company, 78 Iowa, 438; Chicago, K. & W. R. Co. v. Cosper, 42 Kan. 561.

the purpose of the assessment of damages for the taking (for railroad purposes) of land in one only of such parcels.[1]

§ 262. **Damages independent of value of lands taken.**—In estimating damages to property independent of the value of that actually taken, substantially the same principles apply as to the admissibility of evidence and matters which may be considered by the jury as in determining value of that actually taken. All the elements materially and directly enhancing or offsetting the damages sustained by the taking are entitled to be presented, and should be considered by the jury. Only such damages as will naturally and reasonably flow from a lawful use of the right of way can be taken into account.[2]

Injury to a subdivision, through which the road does not pass, but which constitutes part of the same farm,

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[1] Cameron v. Chicago, M. & St. P. Ry. Co., 42 Minn. 75; 43 N. W. 785. The mere plotting of land upon a map is not such a division of it into separate tracts that the owner's damages must be limited to the particular block, a portion of which, as shown on the map, is actually taken. Currie v. Waverly & N. Y. B. R. Co., (N. J.) 20 A. 56. Where the jury specially finds the amount of the depreciation in value on an entire tract of land by reason of the construction of a railroad through a part of it, such sum must neccessarily include the elements of damages causing such depreciation, like inconvenience, and damage from fire. St. Louis, Ft. S. & W. R. Co. v. McAuliff, 43 Kan. 185. See also, Chicago P. & St. L. Ry. Co. v. Aldrich (Ill.), 24 N. E. 763. But where suburban property was divided into lots for purposes of sale, and with nothing to show that it was intended to be used as one tract, a railroad company on taking portions of certain lots for railroad purposes is liable, only for the damage of the lots from which a part was taken and not for damages to the whole tract. Keeper v. St. Paul & N. P. Ry., 41 Minn. 340.

In an assessment of damages for lands taken for a court-house, evidence of sales of similar estates in the neighborhood is admissible, though made from 5 to 20 months after the taking of the land. Roberts v. City of Boston, 149 Mass. 346. See also Kiernan v. Railroad Co., 123 Ill. 188; Eslich v. Railway Co., 72 Wis. 229.

[2] Porterfield v. Band, 38 F. 391. See also, Centralia & C. R. Co. v. Brake, 125 Ill. 393; Roushlange v. Railway Co., 115 Ind. 106. In street, see Adams v. Railroad Co., 39 Minn. 286; Denver & R. C. Ry. Co. v. Schmitt, 11 Colo. 56; Eslich v. Railway Co., 75 Iowa, 443. Cuts and fills necessary to be made in the construction of a road ought also to be considered as enhancing the damages. Kansas City, C. & S. R. Co. v. Story, 96 Mo. 611.

should be estimated as part of the damages though not mentioned in the petition.[1]

In an action against elevated railroad companies for damages to adjoining property, caused by its construction and operation, the element of noise may be considered in awarding damages.[2]

It is not necessary to establish an actual trespass or physical taking of the property itself. It suffices if the property has been substantially damaged by the public work.[3] Evidence of the value per acre of the land in-

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[1] Kansas City C. & S. R. Co. v. Story, 96 Mo. 611.

[2] Kane v. Metropolitan El. Ry. Co., 6 N. Y. S. 526. See, generally, Pond v. Metropolitan El. Ry. Co., 112 N. Y. 186; Smith v. East End St. Ry. Co., 3 Pickle, 626; Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434; Council Grove, O. C. & O. Ry. Co. v. Center, 42 Kan. 438; 22 P. 574; Sullivan v. North Hudson County R. Co., 51 N. J. Law, 518; 18 A. 689; Chicago, S. F. & C. Ry. Co. v. Ward, 128 Ill. 349; 18 N. E. 828; Pennsylvania, S. V. R. Co. v. Walsh, 124 Pa. St. 544; 23 W. N. C. 421; In re Department of Public Parks, 53 Hun, 280; 6 N. Y. S. 750; Pingrey v. Cherokee & D. R. Co., 78 Iowa, 438; 43 N. W. 285; Chicago, K. & W. R. Co. v. Cosper, 42 Kan. 561; 22 P. 634; Atchison, T. & S. F. R. Co. v. Schneider, 127 Ill. 144; Borough of Norwalk v. Blanchard, 56 Conn, 461; Reading & P. R. Co. v. Balthasar, 126 Pa. St. 1; 24 W. N. C. 9; 17 A. 518; Chicago, K. & W. R. Co. v. Cosper, 42 Kan. 561; 22 P. 634; Chicago, K. & N. Ry. Co. v. Hazels, 26 Neb. 364; 42 N. W. 93.

[3] Griffin v. Shreveport & A. R. Co. (La.), 6 So. 624.

Evidence is not admissible to show that the owner of the land had declined to sell or lease it, or to show what his reasons were for so doing. Pennsylvania S. V. R. Co. v. Cleary, 125 Pa. St. 442; 23 W. N. C. 429.

In ascertaining the amount of damages to be awarded to the owner of a farm, part of which is taken for a railroad, the tendency to frighten teams employed on the farm, by the running of trains, etc., is not too remote to be taken into consideration. Fayetteville & L. R. Ry. Co. v. Combs, 51 Ark. 330.

In an action of abutting property owners for damages caused by the operation of an elevated railroad in the street in front of plaintiff's premises, the likelihood of the erection by defendants of a station for passengers in front of plaintiff's premises may be taken into account by the trial court in ascertaining the future damages. Stirn v. Metropolitan El. Ry. Co., 21 N. Y. St. Rep. 71; 4 N. Y. S. 323.

In an action for damages for land taken by defendant company for a right of way, defendant is liable for damages to the growing crop outside the right of way, which are actually sustained by reason of the construction of the road; and such damages are not "remote, speculative, or contingent." Haislip v. Wilmington & W. R. Co., 102 N. C. 376.

On the trial of a complaint for the recovery of damages for location of a railroad over complainant's land, an instruction that any permanent injury to the

cluded within the right of way is admissible as showing the damages.[1] Damages should not be "lumped," or estimated arbitrarily, as by doubling the value of the land actually taken.[2] On the same principles, plaintiff must show damages special and peculiar to his property, and different in kind from those suffered by the public generally.[3] No award can be made for the loss of an established business, caused by the taking of the land on which it is situated; nor of the water-power, as that is an appurtenance of the land.[4]

§ 263. Community benefits not considered.—In condemnation proceedings, advantages in reduction of damages

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land, caused by its rightful use by another company, should be considered as an impairment of its value, is not erroneous. Thomson v. Sebasticook & M. R. Co., 81 Me. 40. In ascertaining the amount of damages to be awarded to the owner of a farm, part of which is taken for a railroad, the tendency to frighten teams employed on the farm, by the running of trains, etc., is not too remote to be taken into consideration. Fayetteville & L. R. Ry. Co. v. Combs, 51 Ark. 330.

[1] Pingrey v. Cherokee & D. R. Co., 78 Iowa, 438; 43 N. W. 285.

[2] Kansas City, C. & S. R. Co. v. Story, 96 Mo. 611.

[3] Where the street was obstructed 500 feet from plaintiff's property, and his only injury was inability to use the street, it was held he could not recover. Rude v. City of St. Louis, 93 Mo. 408; 6 S. W. 257. See also Wilson v. New York Cent. & H. R. R. Co., 2 N. Y. S. 65; Wilcox v. City of Meriden, 57 Conn. 120; McReynolds v. Kansas City C. & S. R. Co., 34 Mo. App. 581; In re Brooklyn El. R. Co., 55 Hun, 165; 8 N. Y. S. 78; Newman v. Metropolitan El. Ry. Co., 118 N. Y. 618; Long v. Harrisburg & P. R. Co., 126 Pa. St. 143. The owner of land abutting on a street over which a railroad has been built, with the consent of the municipality, cannot recover from the railroad company for loss of trade occasioned by the diversion of travel to another street on account of the presence of the railroad, since such damage is not peculiar to himself. Jackson v. Chicago, S. F. & C. Ry. Co., 41 F. 656.

Where gates and barriers for the protection of the public are built and maintained in the street upon plaintiff's lot, by a railway company, in compliance with an order of the common council, the company is not liable in damages for a taking of the property. Trustees of First Congregational Church v. Milwaukee & L. W. Ry. Co. (Wis.), 45 N. W. 1086.

But under Const. Kan., art. 12, sec. 4, providing that no right of way shall be appropriated until full compensation be made in money, "irrespective of any benefit from any improvement," excludes from consideration even special benefits accruing to the residue of the land not taken. Leroy & W. R. Co. v. Ross, 40 Kan. 598. See also Wilcox v. City of Meriden, 57 Conn. 120.

[4] In re Department of Public Parks, 53 Hun, 280; 6 N. Y. S. 750.

are to be confined to those which are peculiar to the owner, excluding those which he shares with other members of the community whose property is not taken.[1] But direct benefits to the owners land not taken may be considered.[2]

§ 264. Not entitled to damages for independent trespasses.—In condemnation proceedings for the assessment of damages occasioned by the procuring of the right of way for a railroad company the owner of the land may recover damages only for his loss in surrendering to the railroad company such right of way, and cannot recover for independent trespasses committed by the railroad company or its agents outside of the right of way.[3]

§ 265. The right strictly legal.—The proceeding is legal, not equitable.[4] Consequently the prescribed legal requirements must be substantially fulfilled in order to acquire title thereby, such as the publication of notice to non-residents.[5] A non-resident owner of land is

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[1] Short v. Rochester & P. R. Co. (Pa.), 8 A. 596. In re Rugheimer, 36 F. 376; Pacific Coast Railway Co. v. Porter, 74 Cal. 261; 15 P. 714; Ball v. Keokuk & N. W. Ry. Co., 74 W. Iowa, 132; 37 N. W. 110; Whitely v. Mississippi, W. P. & B. Co., 38 Minn. 122; 23 N. W. 753; Harwood v. City of Bloomington, 124 Ill. 48; 16 N. E. 91.

[2] Harwood v. Bloomington, supra; Laflin v. Chicago W. & N. R. Co., 33 F. 415; Schaller v. City of Omaha, 23 Neb. 325; 36 N. W. 533; Chicago, K. & N. Ry. Co. v. Wieb, 25 Neb. 542; Omaha Belt Ry. Co. v. McDermott, 25 Neb. 714; Haislip v. Wilmington & W. R. Co., 102 N. C. 376; 8 S. E. 926; Ball v. Railway Co., 74 Iowa, 132; Calumet R. Ry. Co. v. Moore, 124 Ill. 329; Chicago P. & St. L. Ry. Co. v. Aldrich (Ill.), 24 N. E. 763; Sixth Ave. R. Co. v. Metropolitan El. Ry. Co., 56 Hun, 182; 9 N. Y. S.; Pittsburgh, B. & B. R. Co. v. McCloskey, 110 Pa. St. 436; 1 A. 555.

[3] Leavenworth N. & S. Ry. Co v. Usher, 42 Kan. 637; 22 P. 734; Council Grove, O. V. & O. Ry. v. Center, 42 Kan. 438; State v. City of Bayonne, 51 N. J. Law, 428; Sullivan v. Railroad Co., Id., 518; Currie v. Waverly & N. Y. B. R. Co., (N. J.) 20 A. 56.

[4] Union Mut. Life Ins. Co. v. Slee, 123 Ill. 57; 12 N. E. 543; 13 N. E. 222.

[5] Hull v. Chicago B. & Q. R. Co., 21 Neb. 371; 32 N. W. 162; Missouri Pac. Ry. v. Houseman, 41 Kan. 300. As to what should contain, see Huling v. Kan. Val. Ry. & Imp. Co., 130 U. S. 559; 9 S. Ct. 603; Broezel v. City of Buffalo, 53 Hun, 631; 6 N. Y. S. 723.

bound to take measures to be represented when his property is called into requisition; and if he fails to do this, and fails to get notice of the proceedings by the ordinary publication, he must abide the consequences. Such publication is so far "due process of law."[1]

But failure of clerk to notify owner of the report of commissioners when practicable, is material irregularity.[2]

§ 266. **Conclusiveness of award.**—A grant of power to accomplish any particular enterprise, especially one of a public nature, carries with it authority to do all that is necessary to effect the principal object.[3]

For this reason, "the final award, is a bar to an action for any injury which the appraisers could have legally estimated irrespective of their action upon the claims for injury or even their knowledge of its existence. They are conclusively presumed to have performed their duty except in a direct proceeding to set aside the award or on appeal."[4] It seems to be the settled view in Indiana

[1] Huling v. Kaw. Val. Ry. & Imp. Co., 9 S. Ct. 603; 130 U. S. 559.

[2] Swan v. Chicago S. F. & C. Ry. Co., 38 Mo. App. 588.

[3] Babcock v. Western R. Corp., 9 Metc. 553.

[4] Pierce on Railroads, 177. Where the charter of a railroad company enabled it to locate its tracks upon a street and to appropriate a right of way six rods wide and it gave notice that its appropriation would be made "in as full, ample and perfect a manner as may be required" for railroad purposes, and it paid the assessed damages, which were duly accepted, it was held that the building by it of a side track in the street upon its right of way, along a single track which it had there in operation, constituted no additional burden upon the property of abutting owners for which damages could be recovered by them. White v. C. St. L. & P. R. R. Co., 122 Ind. 317; 7 L. R. An. 257. In Chicago, R. I. & P. R. Co. v. Smith, 111 Ill. 363, it was held that where a person conveys right of way on his land it will be conclusively presumed that all the damages to the balance of the land, past, present and future, were included in the consideration paid him for his conveyance the same as an assessment of damages on a consideration would be presumed to embrace, and that a grant of a right of way for all uses and purposes of the company or in any way connected with the construction, preservation, occupation and enjoyment of said road, is broad enough to embrace all uses for railroad purposes, however much increased and by any other companies, authorized by law.

that a claim for damages cannot be reviewed, and when damages are assessed for an injury to property from a permanent improvement or taken for public use it bars all actions for future damages.[1]

§ 267. **Use of streets by railroads.**—A city cannot authorize a railroad company to use its streets without statutory provision therefor.[2] And in case of an attempt and an unauthorized exercise of such power a property owner is entitled to an injunction. A stockholder may enjoin.[3] When license is given by a municipality and limited as to time, it lapses *ipso facto* if not availed of within the time.[4] A railroad company cannot take lands used as a public park in a city except in case of absolute necessity and when expressly authorized.[5]

§ 268. **Elevated street railways.**—The construction of elevated street highways above the street on which cars are run by steam at a high rate of speed at frequent intervals, the elevated frame-work of the structures being of a character to obstruct the light and cause a deprivation of air previously enjoyed by the occupants and owners of adjacent premises, is an unusual use entitling them to compensation for the injury.[6]

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[1] Lafayette v. Nagle, 113 Ind. 425.

[2] Atlantic, etc., R. Co. v. St. Louis, 66 Mo. 228.

[3] Teachout v. Des Moines, etc., St. Ry., 38 N. W. Rep. 145 (Iowa), 1888. See also, Wiggins Ferry Co. v. East St. Louis, etc., R'y, 107 Ill. 450. The license given by a city does not relieve the railroad company from liability to owners of property adjacent to the street. Denver, etc., R. Co. v. Bourne, 11 Colo. 59; 16 P. 839.

[4] Atchison, etc., R. Co. v. Nave, 38 Kan. 744; 17 P. 587.

[5] Re Boston, etc., R. Co., 53 N. Y. 574. But property may be taken for a park as for other public purposes. Matter of Central Park, 63 Barb. 282.

[6] Story v. N. Y. Elevated R. R. Co., 90 N. Y. 122; MILLER, EARL and FINCH, JJ., dissenting. See Arnold v. Hudson River R. R. Co., 55 N. Y. 661; In re Met. El. R. Co., 2 N. Y. S. 278.

§ 269. **Street railways operated by horse power.**—But while a railroad constructed in a street or highway and operated by steam in the usual manner imposes a new servitude so as to entitle the owner of the fee to an additional compensation, it is well settled that a street railway operated by horse power in the ordinary way does not.[1] The reason for the discrimination is that the motor and carriages of a steam railroad come into serious conflict with the usual modes of travel and are a perpetual embarrassment to the travelling public in greater or less degree according to the extent of the business done on the railroad, and the frequency with which trains run; whereas the ordinary street railway, instead of adding a new servitude to the street, operates in furtherance of its original uses and relieves the pressure of local business and travel.[2]

§ 270. **Railroads on common highways.**—The construction of a railroad upon a turnpike in such a manner as to leave room for the free passage of carriages and vehicles on each side, is not a new use entitling adjacent landowners to compensation. It is rather a modification of the original use. And the fact that the grade of the turnpike had been altered by the railroad company in order to adopt it to the modified use would not be sufficient to give any claim to such landowners

1 Mills on Em. Dom., sec. 205; Newell v. Minn., L. & M. R. Co., 35 Minn. 112; 25 Am. L. Reg. N. S. 431, and cases cited.

2 Taggart v. Newport St. R. Co., R. I. Sup. Ct., 1890; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62. See also Att'y-Gen. v. Metropolitan R. Co., 125 Mass. 515; Citizens' Coach Co. v. Camden Horse R. Co., 33 N. J. Eq. 267; Elliott v. Fair Haven & W. R. Co., 32 Conn. 579; Hobart v. Milwaukee City R. Co., 27 Wis. 194. The only considerable privilege which the horse car has with respect to the use of the street is that, being confined to its tracks, it cannot turn aside for other vehicles, while they are forced to turn aside for it; but this is an incidental matter insufficient to make the horse railroad a new servitude. Shea v. Potrero & B. V. R. Co., 44 Cal. 414.

for compensation, if such changes were authorized in the company's charter.[1]

Highways may be taken when necessary for crossings as well as for depots and grounds.[2] It would be otherwise if the appropriation of a highway to a railroad company's use destroyed the ordinary and legal use of it as a highway. In that case the owners of the fee in the land previously subjected to use as a highway would be entitled to compensation.[3]

§ **271. State not entitled to compensation.**—Authority conferred by a charter or general law to make a public improvement which necessitates the appropriation of lands belonging to the state, does not impose upon the person or corporation making the improvement an obligation to compensate the state in the absence of express provisions to that effect.[4]

The right to appropriate state lands the same as that of individuals will be presumed when such taking is necessary to the accomplishment of the undertaking for which the power was conferred and the grant contains no expression of a contrary intention.[5]

§ **272. Compensation of corporation.**—Corporations whose property is taken are entitled to compensation like individuals. And where their franchises are taken and appropriated by other corporations they have the same rights and are afforded the same protection as

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1 Peddicord v. Baltimore, etc., R. R. Co., 34 Md. 463; Ottawa, etc., R. Co. v. Larson, 40 Kan. 301; 19 P. 661; Same v. Peterson, Id. 666.

2 State v. Railroad Commissioners, 56 Conn. 308; 15 A. 756.

3 Morris v. Essex R. R. Co. v. Newark, 2 Stockt. Ch. 352.

4 Stockton v. Baltimore & N. Y. R. Co., 32 F. 9.

5 Black River Improvement Co. v. Lacrosse Booming and Transportation Co., 54 Wis. 659; referring to Ind. C. R. R. Co. v. State, 3 Ind. 421; Pa. R. R. Co. v. R. R. Co., 8 C. E. Green, (N. J.) 157; Davis v. E. T. & Ga. A. R. R. Co., 1 Sneed, Tenn. 94; U. S. v. R. R. Bridge Co., 6 McLean, 517.

in other appropriations under the power of eminent domain. And such right is not affected by the fact that the property so taken and appropriated was originally acquired by them in the same way.[1]

§ 273. Reversion of the fee in land upon cessation of use.—After the use for which lands were acquired in the exercise of the power and to which they have been devoted has terminated or the enterprise of the promoters been abandoned, such lands revert to the original owner or his successors in interest, in whom the fee remains subject to the public servitude.[2]

A strict adherence to this rule is the only safeguard against evils which would result from acquisitions by corporations of lands for private purposes in the name of public necessity, by which means they would accomplish indirectly what they are prohibited from doing directly. Still a railroad company may so contract as to acquire the fee ;[3] but only of essential property.[4]

Usually, however, the rule is as above stated, and the original owner may continue to use the property in any way which does not interfere with the use of it for the purposes for which it was taken.[5]

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[1] Grand Rapids, etc., R. R. Co. v. Grand Rapids, etc., Co., 35 Mich. 265; Cincinnati, etc., R. R. Co. v. Danville, etc., R. R. Co., 75 Ill. 113. See Mass., etc., R. R. Co. v. Boston, etc., R. R. Co., 121 Mass. 124.

[2] Kansas Center R. R. Co. v. Allen, 22 Kansas, 285; Heard v. Brooklyn, 60 N. Y. 242; Hastings v. B. & M. R. R. Co., 38 Iowa, 316; Dean v. Sullivan R. R. Co., 22 N. H. 316; Kellogg v. Malin, 50 Mo. 496; Troy, etc., R. R. Co. v. Potter, 42 Vt. 265; Robins v. St. Paul, etc., R. R. Co., 22 Minn. 286. See Woodworth v. Payne, 74 N. Y. 196; Pinkerton v. Boston, etc., R. R. Co., 109 Mass. 527.

[3] Ballard v. Louisville R. Co. (Ky.), 5 S. W. 484.

[4] It was held that a railroad could not after using earth taken for filling excavations sell it to other parties. Aldvich v. Drury, 8 R. I. 554; Chapin v. Sullivan R. Co., 39 N. H. 564.

[5] Henry v. Dubuque, etc., P. R. Co., 2 Iowa, 288; Giesy v. Cincinnati, W. & Z. R. Co., 4 O. St. 308; Weston v. Foster, 7 Metc. 297; Quimby v. Vermont Central, etc., 23 Vt. 387; Dean v. Sullivan R. R. Co., 22 N. H. 316, 321. And see Jackson v. Rutland, etc., B. C. Co., 25 Vt. 151; Adams v. Rivers, 11 Barb. 290; Blake v. Rich, 34 N. H. 282; Jackson v. Hathaway, 15 John, 447.

CHAPTER XII.

ORGANIZATION BY CHARTER MEMBERS.

§ **274. Preliminary membership.**—While the corporation itself is a distinct legal entity from the persons composing it, we cannot possibly conceive of a corporation being organized and put in working shape for the business for which it was chartered without willing incorporators preceding organization, and members or shareholders afterwards. Those to whom the charter is granted or who sign the articles before filing are incorporators, but cease to be such after incorporation, when they become members.[1] One who has signed a contract to take part of the original issue of stock of a corporation is a subscriber.[2] After a subscription has been accepted by the corporation, he becomes a shareholder.[3] It would be idle to speak of conferring franchises without recipients of the same. But though the organization is not complete under either general or special laws

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[1] Chase v. Lord, 77 N. Y. 1, 11; Lady Bryan's Case, 1 Saw. 349.

[2] Peninsular, etc., R. R. Co. v. Duncan, 28 Mich. 130; Busey v. Hooper, 35 Md. 15; Spear v. Crawford, 14 Wend. 20, 23; Thomas Tunnel Co. v. Sheldon, 6 Barn. & C. 341.

[3] See Wonall v. Judson, 5 Barb. 210; Adderly v. Storm, 6 Hill, 624; State v. Tennis, 42 Conn. 560; Rosevelt v. Brown, 11 N. Y. 148, 150.

until all the steps in the process of incorporation have been taken, yet in legal contemplation the corporation exists from the filing of articles in the proper office in the one case and from acceptance of the charter in the other.

The usual language of a general statute is that "corporations may be formed by," etc., which means that there is no corporation until the prescribed acts have been performed. Sometimes more explicit language is used, and it is declared that "upon filing said articles of incorporation with the Secretary of State (or other officer) the persons who have signed and acknowledged the same become a body politic or corporate."

Corporations having no capital stock may be considered as completely organized upon the filing of the articles; for our conception of a corporation is thereby satisfied, all the essential parts being then *in esse*, to wit, a legal institution with corporate powers and a complete membership to give it direction and exercise its powers.

§ **275. Defective execution of articles.**—It is quite clear upon the authorities that the mere signing without acknowledging the articles does not constitute the signers, subscribers, or members. As to them the instrument is incomplete and cannot be enforced either for or against the corporation.[1]

The authorities cited below furnish a safe guard on a subject where much uncertainty and some conflict of decisions have heretofore existed. By adhering strictly to the law just declared, that no contract to take shares made before incorporation and ac-

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[1] Indianapolis Furnace, etc., Co. v. Herkimer, 46 Ind. 142; Dutchess & C. C. F. Co. v. Mabbett, 58 N. Y. 397; Reed v. Richmond St. R. Co., 83 Ind. 9; Williamson v. Kokomo Bldg. & L. F. Ass'n, 89 Id. 397.

ceptance can be made to inure in favor of the corporation without the appointment of an agent to represent all parties, or unless the agreement forms a part of the articles as filed, no hardship or inconvenience can possibly result, and a certain and just rule of business and dealing is established,—always a desirable object.

§ **276. Proceedings after filing articles.**—Corporations which have a capital stock, though existing for certain purposes, are not complete for all purposes until further steps are taken after filing the articles, for as yet there are no members. It is usually required that the directors for the first year or term shall be named in the articles. Such directors do not constitute the corporation or its membership, for there is no corporation except in name. They open stock subscription books and do all other acts necessary to complete the organization but the components of the corporate body are those who become stockholders after the filing. These alone have the right to give direction to the corporate enterprise and dispose of its estate. The directors, however, previous to complete organization, may receive and transfer property in the corporate name and hold it for the benefit of future members.[1]

The case is not altered when the corporation is organized in the name of "The President and Board of Directors of," etc., or other similar designation. Such is a difference in form only and, need not be noticed except in the technique of legal procedure. The members still constitute the corporation and own its property, while the directors are their agents and trustees.

§ **277. No notice of preliminary organization required.**—Compliance with statutory provisions requiring the articles to state the names and places of residence of

[1] Coyote, etc., Mining Co. v. Ruble, 8 Or. 284, 293.

the directors appointed for the first year would seem to require a meeting of the incorporators previous to incorporation for the purpose of making the appointments; but no express direction for calling and giving notice of conducting such preliminary meeting is generally given. In actual practice the necessity for such preliminary meeting is dispensed with by unanimous consent of all the incorporators, evidenced by their signature to the articles containing the names of the directors for the first year and the other terms upon which it is agreed to become associated as a body corporate. But there must be a meeting after incorporation and before the adoption of by-laws containing specific rules and regulations governing the calling and conduct of the meeting. Such meeting or some act on the part of the members is necessary to put the corporate machinery just invented in motion.[1] Where a meeting is held in compliance with a statute its formalities must be followed.[2]

§ 278. **Notice of subsequent meetings.**—If neither the by-laws adopted at the first meeting nor the articles provide how notice of subsequent meetings shall be given, there should be personal written or printed notice signed by some person authorized to designate the time and place of meeting; though verbal notice whereby all the members obtained full information of the proposed meeting and its objects if proven would no doubt be deemed sufficient.[3] Indeed it would generally be

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[1] The California statute has directed such meeting to be called, held and conducted, and specified the manner and the objects for which it may be held. It also provides the means by which such meeting may be dispensed with. Civ. Code, sec. 301.

[2] Bethany v. Sperry, 10 Conn. 200; Shelby R. R. Co. v. Louisville R. R. Co., 12 Bush. 62.

[3] See Stow v. Wyse, 7 Conn. 214; Savings Bank v. Davis, 8 Id. 191; Bethany v. Sperry, 10 Id. 200; Stevens v. Eden Meeting House Soc., 12 Vt. 688; Wiggin v. Free Will Baptist Church, 8 Metc. 301; Evans v. Osgood, 18 Me. 213; Jones v. Milton, etc., Co., 7 Ind. 547; Johnston v. Jones, 23 N. J. Eq. 216.

practically impossible to give actual notice to all the members. This rule requiring notice does not apply to regular stated meetings provided for in the articles and by-laws, which are deemed to have been fixed by the mutual consent of all the members, and of which they are bound to take notice without further action.[1] If, however, it is proposed to transact any other business at one of the set-day meetings than such as is ordained by the constitution, notice must be given as in other cases.[2] Proof that a day was fixed by common consent dispenses with notice of any and all meetings held on that day.[3] If, however, the charter or articles require a special notice, it has been held that it cannot be dispensed with even by consent;[4] but it may be stated as a well-established rule that all who attend a meeting and participate in the proceedings without objection founded on lack of notice will be estopped from objecting subsequently.[5] Due notice to all the members of a meeting will be presumed until the contrary is made to appear.[6] Members not present at a meeting for want of notice will be bound by such of the proceedings thereat as they subsequently acquiesce in or ratify.[7]

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[1] Rex v. Hill, 4 B. & C. 441, 443; Rex v. Carmarthen, 1 M. & S. 702; Warren v. Mower, supra; State v. Bonnell, 35 Ohio St. 10.

[2] Grant on Corp. 157.

[3] Atlantic Fire Ins. Co. v. Sanders, 36 N. H. 252; Lane v. Brainerd, 30 Conn. 565.

[4] Rex v. Theoderick, 8 East. 543; U. S. v. McKelden, 4 McArthur, 162.

[5] Rex v. Chetwynd, 7 B. & C. 695; Matter of British Sugar Refining Co., 3 K. & J. 408; 26 L. J. Ch. 369; Jones v. Milton, etc., Turnpike Co., 7 Id. 547; Samuel v. Holliday, 1 Woolv. C. C. 400; People v. Peck, 11 Wend. 604; Stebbins v. Merritt, 10 Cush. 27.

[6] Sargent v. Webster, 13 Metc. 497.

[7] Turquand v. Marshall, L. R. 4 Ch., 376; Smallcombe v. Evans, 3 H. of L. Cas. 249; Bryant v. Goodnow, 5 Pick. 228. See Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43; Ramsey v. Erie, R. R. Co., 38 How. Pr. 193; s. c. 7 Abb. Pr. N. C. 156. Infra, Ch. XV.

CHAPTER XIII.

SUBSCRIPTIONS TO CAPITAL STOCK.

§ 279. **Subscriptions distinguished from other membership contracts.**—A nominal distinction is generally observed between the constituents of capital stock corporations and such as have no capital stock, the term stockholders or shareholders being applied to the former and that of member to the latter. But it is a difference in words only resorted to for the sake of convenience, as in both cases the whole number of persons thus designated own both the franchise and the property in the corporate name.

§ 280. **Capital stock corporations.**—Far outranking in importance all other classes of private corporations are those in which the monetary interest of the members is divided into shares, each share representing a proportionate interest in the property and business of the

joint enterprise. They are familiarly known as capital stock corporations.[1]

§ 281. **Stock, Capital, Capital stock.**—The capital of a corporation means the amount of property possessed by it as forming the basis of taxation, for instance.[2] But by the term capital stock we mean the sum fixed by the charter or articles as the amount paid in or to be paid in by the stockholders as a fund with which to prosecute the corporate business, and to which creditors may look for satisfaction of their demands against the corporation. Consequently, when we speak of membership in a capital stock corporation, we mean an individual interest acquired by contract, in such fixed sum, and a proportionate liability.[3] There is a distinction also to be taken between the terms stock and capital stock, often used indiscriminately. "Stock" means the segregated interests in the hands of individuals, while "capital stock" signifies the aggregate interest.[4] The term "stock" is rarely applied to government securities in this country at present, though it was formerly in common use to designate municipal bonds, and is still so used in England.[5]

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[1] This class of corporations was scarcely known in this country prior to the Revolution. McKim v. Odom, 3 Blands. Ch. (Md.) 407, 418.

[2] Ohio & M. R. R. Co. v. Weber, 96 Ill. 443; City of Phila. v. Ridge Ave. R. Co., 102 Pa. St. 190.

[3] The definitions vary, but the above is the plain English of what the courts would say. EARL, J., in Williams v. Western Union Tel. Co., 93 N. Y. 162, 188; defines capital stock to be "the property of the corporation contributed by its stockholders or otherwise obtained by it to the extent required by its charter." Almost exactly the same definitions are given by Justice FIELD in Bailey v. Clarke, 21 Wall. 284; and by FOLGER, J., in Burrall v. Bushwick R. Co., 75 N. Y. 211. See also Jones v. Davis, 35 Ohio St. 474, 476; Barry v. Merchants' Exch. Co., 1 Sandf. Ch. 280, 305; Christenson v. Eno, 106 N. Y. 97, 100; Hightower v. Thornton, 8 Ga. 486; Hannibal & St. Joseph R. Co. v. Shacklett, 30 Mo. 551, 558; St. L. I. M., etc., R. Co. v. Loftin, 30 Ark. 693, 709.

[4] Burr v. Wilcox, 22 N. Y. 551, 555; People v. Commrs., etc., 23 N. Y. 192, 220; Bailey v. R. R. Co., 22 Wall. 604, 637.

[5] Cavanaugh's Money Securities (2nd Edition), 488, 494; Bank of Commerce v. New York, 2 Black. 620; Weston v. City of Charlestown, 2 Pet. 449.

§ 282. **What constitutes membership.**—No one assumes any of the duties or liabilities or becomes entitled to any of the benefits of membership in a private corporation aggregate otherwise than by contract, express or implied. In this respect corporations resemble copartnerships. The corporation owes its origin no less to the mutual contract of its incorporators among themselves whereby they agree to form a particular corporation than to the act of the state in conferring a franchise, while in the formation of a copartnership the state has no part. Its essential basis is the precedent agreement of the several partners among themselves.

§ 283. **Laws entering into each contract of membership.**—Whether formed under general laws or special enabling acts, the contract to form a corporation includes the terms and provisions of the law under which it is made. The contract of subscription is to be performed and its terms fixed and construed according to the laws of the state creating the corporation and none others.[1] It is not in the nature of a common law contract for the reason that there must be a statutory license provided by or obtained from the legislature without which it could not be made at all. A subscription for stock is presumed to have been made with reference to the law in force at the time; and where the period prescribed by statute is suffered to elapse without beginning the construction of a railroad, a subscriber for stock is absolved from liability on his subscription, and the subscription cannot be revived by the subsequent passage of an act suspending the limitation and fixing another date when such period shall begin to run, especially as a subsequent

[6] Glenn v. Clabaugh, 65 Md. 65; 3 A. 902, holding that the subscriber to stock in a Virginia corporation could not invoke the insolvency laws of Maryland to discharge him from his obligation to the corporation.

act of incorporation.[1] Though the construction and interpretation of this species of contract are according to common-law rules, yet all questions as to the validity of its terms must be tested by the law under whose authority it is formed. The terms of the charter are the ligaments which bind the members to it, and to each other. No other consideration than the mutual promise of each to all the others is required, and a clear, unequivocal expression of an intention to share in common the benefits and burdens of the proposed corporate enterprise according to the articles under the provision of the particular law governing its creation, are the only essentials of the agreement.

§ **284. Acceptance of amendment to charter a new contract.**—While amendments to charters by special act and in articles of incorporation under general laws allowing such amendments are not binding upon an individual non-consenting member, yet they may be accepted.

Where the change is beneficial, members of the original corporation can have no objection to accepting the change ; and though injurious to their interest they are frequently accepted to avoid a total loss.

In whatever way the acceptance is manifested and accomplished, it is the creation of a new contract of membership governed by the usual rules and requirements applicable thereto.

Every change in the amount of capital stock, or enactment or repeal of a by-law—indeed, any of the internal modifications in the government and management of a corporation, as are provided for by concurrent act of a majority of the membership in the general law—is in

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[1] Bywaters v. Paris & G. N. Ry. Co., 73 Tex. 624; 11 S. W. 856. See also Chesapeake, O. & S. W. R. Co. v. Griest, 85 Ky. 619; State v. R. R. Co., 24 Neb. 143; 38 N. W. 43; Bravard v. R. R. Co. 115 Ind. 1; Young v. R. R. Co., 75 Ia. 140; 39 N. W. 234.

one sense the creation of a new corporation. But these are required to be made from time to time for the welfare and success of the corporate enterprise, and are not such changes as require the consent of all the members. It is only the important changes which amount to substantial departures from the objects and purposes for which the corporation was created that are repugnant to the general law, and so far violative of the terms of each member's contract as to require a novation to become binding upon him.[1]

In Mahan v. Wood[2] promissory notes had been given for shares in a homestead association about to be formed. The articles provided that each share for which the notes were given, should represent a lot of land. It was held that the mere fact that when the association was formed it had a different number of shares from that agreed upon did not constitute a failure of consideration, provided the land was the same and the lots of the same value, but it would be otherwise if the price of each share had been greater than that represented.

§ 285. **Who may become a stockholder.**—The extent of the power of a private corporation to become the owner of its own stock[3] and to subscribe for or purchase shares in other corporations[4] is elsewhere considered. The general capacity of parties to subscribe for shares is limited by and co-extensive with their capacity to make other contracts and assume other liabilities. A state may become a shareholder in a private corporation and acquire equal but no superior right to any other stockholder.[5]

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[1] New Haven, etc., R. R. Co. v. Chapman, 38 Conn. 56; Infra, § 168, et seq.
[2] 44 Cal. 462.
[3] Infra, § 172.
[4] Supra, § 5.
[5] Gibson v. Richmond & E. R. Co., 37 F. 743.

§ **286. Municipalities.**—It is well settled that the disability attaches to municipal as to private corporations, and that without express statutory authority they cannot make a valid subscription. This principle was first asserted in Pennsylvania,[1] and has since been followed in many cases in that and other states and in United States courts. Such subscription is "manifestly foreign to the usual purposes intended to be subserved by the creation of corporate municipalities."[2]

Without legislative sanction for a vote of the people of the municipality authorizing a subscription either for stock[3] or the issue of aid bonds to a railroad company,[4] the defence of a want of legal authority is available in favour of the city, town or county whose officers have issued them against any person to whom such shares of stock or securities have been delivered, whether by the agents of the municipality or in the ordinary course of business, the holder in either case being chargeable with notice of all the statutory provisions and any defect of authority therein.[5]

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1 Sharpless v. Mayor, etc., 21 Pa. St. 147. See also Dill. Munic. Corp. 19, 20, and cases cited.

2 Dillon, Munic. Corp., 161. See also, Kenicott v. Supervisors, 16 Wall. 452; Bell v. Railroad Co., 4 Id. 598; Thompson v. Lee Co., 3 Id. 327; Kelly v. Milan, 127 U. S. 139; Wells v. Supervisors, 102 U. S. 625; Barnes v. Lacon, 84 Ill. 461; Lamoille, etc., R. R. Co. v. Fairfield, 51 Vt. 257; Leavenworth Co. v. Miller, 7 Kan. 479; Sharpless v. The Mayor, 21 Pa. St. 144. Compare Marsh v. Fulton Co., 10 Wall. 676; Welsh v. Post, 99 Ill. 471. Legislative authority (Gen. St. Mo., sec. 338) to subscribe to the stock of a railroad company, will authorize a subscription, but will not validate the issue of negotiable bonds in payment thereof. Hill v. City of Memphis, 134 U. S. 198; 10 S. Ct. 562.

3 City of Jonesboro' v. Cairo, etc., R. R. Co., 110 U. S. 192; Pa. R. R. Co. v. Phil., 47 Pa. St. 189; Allen v. Louisiana, 103 U. S. 80. Compare East Oakland v. Skinner, 94 U. S. 255; Brodie v. McCabe, 33 Ark. 690; Gelpeke v. Dubuque, 1 Wall. 220; Campbell v. Paris, etc., R. R. Co., 71 Ill. 611; City of Lynchburg v. Slaughter, 75 Va. 57.

4 State v. Saline, etc., Court, 51 Mo. 350; City Council, etc., v. Montgomery, etc., Co., 31 Ala. 76.

5 City of Ottawa v. Carey, 108 U. S. 110; Ogden v. County or Daviess, 102 U. S. 634; McClure v. Township of Oxford, 94 Id. 429; Lewis v. City of Shreveport, 108 Id. 282; Dillon on Munic. Corp., sec. 161; La Fayette v. Cox, 5 Ind. 38.

§ 287. **Can only be made for public purposes.**—The power to make such subscriptions is still further narrowed by the rule that they can only be made to aid and encourage enterprises of public utility.[1] The right to aid by taking stock or lending credit even in that case was long denied and combated;[2] but that the legislature may give it is now well settled,[3] and it has been held that the authority was implied in a power given "to borrow money for any purpose;"[4] also that a subscription may be validated by subsequent legislation.[5] The value of such subscriptions was for a long time materially affected by the fact that their payment depends practically upon the will of the legislature to grant and keep in force in the hands of corporate authorities adequate taxing powers, and the willingness of the latter to exercise them.[6]

§ 288. **Validity and enforceability.**—But the course pursued in the federal courts for several years past, of holding municipalities to due performance and enforcing the same by the issuance of peremptory writs of *mandamus* directed to the officers of the same, has effected a wholesome check upon the tendency to reck-

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1 State v. Osawkee Township, 14 Kan. 418; Clark v. Des Moines, 19 Iowa, 199; Bissell v. Kankakee, 64 Ill. 249; Loan Ass'n v. Topeka, 20 Wall. 655; Brewer Brick Co. v. Brewer, 62 Me. 62; Weismer v. Village of Douglass, 64 N. Y. 91; McConnell v. Hamm, 16 Kan. 228; Allen v. Inhabitants of Jay, 60 Me. 124; Lowell v. Boston, 111 Mass. 463; Union Pac. R. R. Co. v. Smith, 23 Kan. 745; Savings Ass'n v. Topeka, 3 Dillon 376; Frederick v. Augusta, 5 Ga. 561; Commercial B'k v. City of Iola, 2 Dillon, 353.

2 See Cooley Const. Lim., 261–6; Dillon, Munic. Corp., 117, 123; Dixon Co. v. Field, 111 U. S. 83.

3 Curtis v. Butler Co., 24 How. 435; Zabriskie v. R. R. Co., 23 Id. 381; Knox County v. Aspinwall, 21 Id. 539; Amey v. Mayor, 24 Id. 364, 376; Gelpeke v. Dubuque, 1 Wall. 175.

4 Rogers v. Burlington, 3 Wall. 654.

5 Campbell v. Keneshá, 5 Wall. 194.

6 It has been held that a state may, after obligations have been incurred under statutory authority, so modify the tax laws as to exempt important portions of taxable property. Gilman v. Sheboygan, 2 Black. 510.

lessly incur bonded and other forms of indebtedness to railroads and afterwards repudiate.[1] And it has now become the settled doctrine that after a subscription has been made under acts passed in strict accordance with constitutional provisions,[2] an act of the legislature so abridging or modifying the taxing power as to deprive the municipality of the power to meet such obligations is unconstitutional and void.[3] A subscription made by an assumed municipality before incorporation upon a vote of the residents within its proposed boundaries is void.[4] But a town may incorporate subsequently under a previous act which authorizes "any incorporated town or city to subscribe for stock," and then make a valid subscription;[5] or it may be made to a corporation not yet created and accepted by the corporation after it comes into existence.[6]

§ 289. **Submission to popular vote, petition, etc.**—In order to render municipal subscriptions valid and binding, a substantial compliance with all the requirements of the statute authorizing the subscription must have been attended to.[7] If a popular vote be required on a

1 See cases cited in preceding notes.

2 Amoskeag Nat. B'k v. Town of Ottawa, 105 U. S. 667.

3 Wolff v. New Orleans, 103 U. S. 358. Compare Hays v. Dowes, 75 Mo. 250; Edwards v. Williamson, 70 Ala. 145. In Napa Valley R. R. Co. v. Napa Co., 30 Cal. 435, it was held that the legislature may compel the making of a subscription, and the issuance of bonds in payment therefor. Compare People v. Batchelor, 53 N. Y. 128; Cairo, etc., R. R. Co. v. Sparta, 77 Ill. 505.

4 Rochester v. Alfred, 13 Wis. 432; Dillon on Munic. Corp., sec. 12, 117, 157; Berliner v. Waterloo, 14 Wis. 378; Clark v. Janesville, 13 Wis. 414; s. c. 10 Id. 136; Cooley on Const. Lim., sec. 261, et seq.

5 Lewis v. Clarenden, 5 Dill. 329.

6 Daviess County v. Huidekopen, 98 U. S. 98; James v. Milwaukee, 16 Wall. 159. See also, Concord v. Portsmouth Sav. B'k, 92 U. S. 625; R. R. Co. v. Falconer, 103 Id. 821. Compare Rubey v. Shain, 54 Mo. 207; People v. Franklin, 5 Lans. (N. Y.) 129.

7 Angel v. Hume, 17 Hun, 374; Buchanan v. Litchfield, 102 U. S. 278; People v. Barrett, 18 Hun, 206; People v. Suffern, 68 N. Y. 321; People v. Hutton, 18 Hun, 116; Carroll Co. v. Smith, 111 U. S. 556; People v. Hurlburt, 46 N. Y.

proposition to subscribe upon one consideration or for a certain purpose, that proposition and no other must be submitted to be voted upon.[1] So bonds must be signed or attested by the officer designated where one is designated, else they are invalid;[2] and the method pointed out for calling and conducting the election must be pursued.[3]

It is not necessary that the designated proportion of all the voters within the territory affected by the proposition be cast for the proposition. It is sufficient if all have an opportunity to express themselves as in other elections. If they do not choose to do so the assent of all who absent themselves is presumed.[4] But where the statute authorizing the submission makes a different provision, as that the proposition shall receive the sanction of a majority of all the taxpayers[5] or in-

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110; Hawley v. Fairbanks, 108 U. S. 543; Wilson v. Cancadia, 15 Hun, 218; Wheatland v. Taylor, 29 Hun, 70.

[1] As where the authority given was to issue bonds running 20 years upon a vote of sanction being obtained, and the proposition as submitted called for bonds running not exceeding 10 years. Cairo, etc., R. R. Co. v. Sparta, 77 Ill. 505. See also Jessamine Co. v. Swigert's Admr. (Ky.), 3 S. W. 13; Hamlin v. Meadville, 6 Neb. 227, where it was held that a vote authorizing a subscription gave no power to make a donation. And if the vote be directed to be taken at a regular town meeting and it be taken at a special one, it is irregular and insufficient. Parea v. Lippincott, 2 Bradw. (Ill.) 466.

[2] Bissell v. Spring Valley, etc., Co., 110 U. S. 162.

[3] In People v. Smith, 45 N. Y. 77, it was held that where the act required a petition of taxpayers, a petition by an agent for them was insufficient. So a vote in the alternation as to grantor is void. State v. Roggen, 22 Neb. 118; 34 N. W. 108. If a registration of votes be required, such registration is indispensable. People v. Santa Anna, 67 Ill. 57. See State v. County of Wabaunsee, 36 Kan. 180; 21 P. 942; People v. Laena, 67 Ill. 65. Observance in the matter of appointing officers and the general conduct of the election by them is necessary. Chicago, etc., R. R. Co. v. Mallory, 101 Ill. 583.

[4] County of Cass v. Jordan, 95 U. S. 373; Carroll Co. v. Smith, 111 U. S. 556; State v. Brassfield, 67 Mo. 331; People v. Chapman, 66 Ill. 137; Hawkins v. Carroll Co., 50 Miss. 735; County of Cass v. Johnson, 95 U. S. 360; Louisville, etc., R. R. Co. v. Tenn., 8 Heisk. 663; Webb v. La Fayette Co., 67 Mo. 353; People v. Harp, 67 Ill. 62; Dunnovan v. Green, 57 Ill. 63; St. Joseph v. Rogers, 16 Wall. 644; Milner v. Pensacola, 2 Woods, 632; Melvin v. Lisenby, 72 Ill. 63; Reiger v. Beaufort, 70 N. C. 319.

[5] Culver v. Fort Howard, 8 Hun, 340.

habitants, a majority of those actually voting is not sufficient.[1] So where the submission is required to be based upon a petition of a certain proportion[2] or a designated number,[3] a petition by a less proportion or a less number will invalidate the subscription.

§ **290. Presumptions—Bona fide purchasers.**—But compliance in unimportant details and matters of form is not required. "Defects, irregularities or informalities which do not affect the result of the vote do not affect its validity."[4]

While substantial requirements cannot be dispensed with, there are frequently mere irregularities which, however they may affect the immediate parties, cannot be set up to defeat a recovery by innocent holders without notice of the same. They are allowed to indulge in the presumption that all the preliminary and merely ministerial acts were duly and properly performed.[5] Irregularities in holding, conducting and cer-

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[1] Walnut v. Wade, 103 U. S. 683.

[2] People v. Smith, 45 N. Y. 772; People v. Hughitt, 5 Lans. 89; Wellsborough v. New York, etc., R. R. Co., 76 N. Y. 182; People v. Hulburt, 59 Barb. 446; People v. Franklin, 5 Lans. 129; People v. Peck, 62 Barb. 545; People v. Oliver, 1 Thomp. & C. 570. Compare Syracuse Sav. B'k v. Seneca Falls, 21 Hun (N. Y.), 304; St. Joseph Township v. Rogers, 16 Wall. 644; Faris v. Reynolds, 70 Ind. 360.

[3] Monadnock R. R. Co. v. Petersboro, etc., 49 N. H. 281; Gilson v. Dayton, 123 U. S. 59.

[4] Commrs. v. Thayer, 94 U. S. 631. Where no mode of submission is prescribed, an election held according to the usual method is sufficient. People v. Logan Co., 63 Ill. 374. The absence of a seal does not affect the right of a *bona fide* holder to recover upon bonds issued in payment of a subscription. Draper v. Springport, 104 U. S. 501. A notice for a town meeting "to see if the town will loan its credit" for the proposed object, was held sufficient notice that a stock subscription to a railroad company named in the notice would be acted upon. Belfast, etc., R. R. Co. v. Brooke, 60 Me. 568.

[5] See Munson v. Lyons, 12 Blatch. 539; Draper v. Springport, 104 U. S. 501; Clarke v. Hancock; Supervisors v. Schenck, 5 Wall. 772. Compare Pana v. Bowler, 107 U. S. 529; Singer Mfg. Co. v. Elizabeth, 42 N. J. L. 249; County of Jasper v. Ballou, 103 U. S. 745; Johnson v. Stark, 24 Ill. 75; New Haven, etc., v. Chatham, 42 Conn. 465.

tifying the election cannot be taken advantage of after the bonds or stock have passed into the hands of *bona fide* purchasers for value.[1]

§ **291. Registration.**—If registration with a certain officer be required of the bonds issued in payment of the subscription before delivery to a purchaser, such registration is usually considered essential to their validity.[2]

§ **292. Who to make the subscription for municipality.**—The same principles of agency govern in this case as in the execution of powers by corporations generally. If no particular agent or body is designated by the statute, the contract may be made by those who usually execute the contracts of the corporation. But a provision that some particular agent or person or body shall make it must be strictly complied with.[3]

§ **293. Infants—Married women—Partners.**—Stock in a corporation by an infant cannot be regarded as a necessary of life. But, like other contracts of this nature, it is not void but only voidable, and may be ratified by the infant at his majority.[4]

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[1] Kimball v. Town of Lakeland, 41 F. 289; Madison Co. v. Brown (Miss.), 7 So. 516. Compare Wilson v. Union Sav. Ass'n, 42 F. 421. Where an election is called for the purpose of voting on a proposition to issue bonds in aid of a certain railroad, the submission to the voters, at the same election, of a proposition to aid any railroad that may be built between two certain points within the next five years, though improper, does not invalidate bonds issued to the first-named railroad in pursuance of such election, after such bonds have passed into the hands of innocent purchasers. Williams v. People (Ill.), 24 N. E. 647.

[2] Hoff v. Jasper County, 110 U. S. 53; Anthony v. Jasper County, 101 U. S. 693.

[3] Nugent v. Supervisors, 19 Wall. 241; County of Moultrie v. Rockingham Ten Cent Sav. B'k, 92 U. S. 631; County of Cass v. Billett, 100 Id. 585. Compare State v. Jennings, 4 Wis. 549. See also, Chicago, etc., R. R. Co. v. Putnam (Kan.), 12 Pac. Rep. 593, where it was held that a board of supervisors could authorize the county clerk to sign for them.

[4] Lumsden's Case L. R., 4 Ch. 31. Holding the shares for fourteen months

Undoubtedly, acting as a shareholder and receiving the benefits of such relation for a considerable time creates an estoppel against him.[1] The defence is personal to the infant and cannot be made available to a transferee.[2] A repudiation during infancy is effectual to render the subscription void *ab initio*.[3]

A married woman could not, at common law, any more than an infant, bind either her husband or her separate estate by a stock subscription. But under liberal statutory provisions both in England and the United States most of her disabilities in the matter of contracting have been removed and her subscriptions where such statutes are in force, and are sufficiently broad in their terms to embrace contracts generally, extend to those under consideration. Where a married woman is incapable under the statute of making a contract binding her personally or charging her separate estate, the husband, if he subscribes for stock in the name of his wife, is personally liable on the subscription, and subject, to the extent of the stock, to any additional liability imposed by the statute on stockholders. [4]Whether a subscription

after coming of age held to be sufficient acquiescence though he had never acted as a shareholder. Ebbete's Case L. R., 5 Ch. 302.

The following acts after coming of age were held a ratification of subscription made before majority. Holding as trustee, and taking no steps to repudiate for two years:—Mitchell's Case L. R., 9 Eq. 363. But a significant act of repudiation is not required. See Wilson's Case L. R., 8 Eq. 240 ; Hart's Case L. R., 6 Eq. 512. It was held not sufficient that after coming of age the infant had surrendered the shares for exchange for others. Pim's Case, 3 De G. & Sm. 11. See also Baker's Case L. R., 7 Chan. 115.

1 Cork, etc., Ry. Co. v. Cazenoe, 10 Q. B. 935; Dublin, etc., Ry. Co. v. Black, 7 Railway & Can. Cas. 434; s. c., 8 Exch. 181; Beardsley v. Hotchkiss, 96 N. Y. 201.

2 Beardsley v. Hotchkiss, 96 N. Y. 201. The court will never presume infancy; hence it must be taken advantage of by plea of confession and avoidance. Leeds, etc., Ry. Co. v. Fearnley, 4 Exch. 26.

3 Parson's Case L. R., 8 Eq. 656; Newry, etc., Ry. Co. v. Coombe, 3 Exch. 565; s. c. 18 L. J. Exch. 325.

4 Clopton, J., dissenting. National Commercial Bank v. McDonnell (Ala.), 9 So. 149; Dorgan v. Same, Id.; Bush v. Same, Id.; McMillan v. Same, Id.

by an individual partner in the firm name will bind the copartnership depends, of course, upon the terms of association. If within the scope of the purposes for which the copartnership was formed, his subscription will bind it;[1] otherwise not.[2]

§ 294. Liability assumed in contract of membership.— Every person who unconditionally subscribes for stock in, or engages to become a member of, an incorporated company, thereby assumes to pay for the same according to the stipulations contained in the articles of association. Whenever the subscription paper refers to the articles, the provisions of the latter are expressly incorporated in the contract of subscription, and when not referred to they form a part of it by implication.[3] It is a liability arising from his contract of membership to contribute the amount of the shares for which he has subscribed and not merely for the number of shares actually taken.[4] The liability of a subscriber to shares of capital stock to contribute capital is of a similar nature as that of one who signs articles of copartnership agreeing to contribute a share of the partnership capital. And this implication attaches to the contract notwithstanding a provision in the constating instruments authorizing a sale of the shares of delinquent subscribers. The power to enforce the claim of the corporation against subscribers by civil action for unpaid subscriptions to the capital stock is cumulative to the

[1] Union Hotel Co. v. Hersee, 79 N. Y. 454; Odgensburg, etc., R. R. Co. v. Frost, 21 Barb. 541; Maltby v. Northwestern, etc., R. R. Co., 16 Md. 422.

[2] Livingston v. Pittsburgh, etc., R. R. Co., 2 Grant's Cas. 219; State v. Beck, 81 Ind. 501. Bernard v. Lapeer, etc., Co., 6 Mich. 274.

[3] Rensselaer, etc., Co. v. Barton, 16 N. Y. 460; Sewall v. Herkimer Mfg. Co., 2 N. Y. 330.

[4] Cole v. Ryan, 52 Barb. (N. Y.) 168; Upton v. Tribilcock, 91 U. S. 45; Webster v. Upton Id. 67; Fry's Ex'trs. v. Lexington, etc., R. R. Co., 2 Metc. (Ky.) 316, 317; International Fair & Exp. Assn. v. Walker (Mich.), 47 N. W. 338.

right of forfeiture, where there are no provisions to the contrary.[1]

§ 295. **A different rule in New England States.**—Such is the recognized and established doctrine in most of the states; but a rule was established in the New England States at an early date, and has been since adhered to, to the effect that unless the subscriber expressly promises or the charter expressly obligates him to pay for the stock in his subscription, the corporation cannot collect the same by action at law. The rule originated from the form and peculiarities of early charters to turnpike companies in which the shares of stock were not limited in amount but imposed upon each shareholder an unlimited liability for the whole capital stock except so far as it had already been paid by himself and others. Just how the transmutation in the law from unlimited liability to no liability at all on such contracts was brought about has never been made very clear.[2]

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[1] Multon v. Clayton, 54 Ia. 425; Hughes v. Antietam Mfg. Co., 34 Md. 326; Hartford & N. H. R. R. Co. v. Kennedy, 12 Conn. 514–516; Rensselaer, etc., Plankroad Co. v. Barton, 16 N. Y. 457, note; Lake Ontario, etc., R. R. Co. v. Mason, 16 N. Y. 451; Buffalo, etc., R. R. Co. v. Dudley, 14 N. Y. 336; Northern R. R. Co. v. Miller, 10 Barb. 297; Dutchess Cotton Mfg. Co. v. Davis, 14 Johns. 239; Essex Bridge Co. v. Tuttle, 2 Vt. 293; Goshen, etc., Turnpike Co. v. Hurtin, 9 Johns. 217; Cheraw, etc., R. R. Co. v. White, 14 S. C. 51; Waukon, etc., R. R. Co. v. Dwyer, 49 Ia. 121; Grosse Isle Hotel Co. v. Panson's Exrs., 42 N. J. L. 10; Kirksey v. Florida, etc., Plankroad Co., 7 Fla. 23; Beene v. Cahawba, etc., R. R. Co., 3 Ala. 660; Troy Turnpike, etc., Co. v. McChesney, 21 Wend. 296; Carson v. Arctic Min. Co., 5 Mich. 282; Dexter, etc., Plankroad Co. v. Millard, 3 Mich. 91; Instone v. Frankfort Bridge Co., 2 Bibb. 577; Klein v. Alton & Sangamon R. R. Co., 13 Ill. 429.

[2] See Worcester, etc., Turnp. Co. v. Willard, 5 Mass. 80; Franklin, etc., Turnp. Co. v. White, 14 Id. 286; Belfast, etc., R. R. Co. v. Moore, 60 Me. 561; White, etc., R. R. Co. v. Eastman, 34 N. H. 124; Conn., etc., R. R. Co. v. Bailey, 24 Vt. 465; Katama, etc., Co. v. Jernigan, 125 Mass. 156; Boston, etc., R. R. Co. v. Wellington, 113 Mass. 79; Russell v. Birstod, 49 Conn. 251. Compare Odd Fellows, etc., Co. v. Glazier, 5 Harr. (Del.) 172; Stokes v. Lebanon, etc., Co., 6 Humph. 241; City Hotel v. Dickinson, 6 Gray, 586; Belfast, etc., R. R. Co. v. Cottrell, 66 Me. 185; Katoma Land Co. v. Holley, 129 Mass. 540. It has frequently been held that an agreement to "take and fill" a number of shares was equivalent to

§ **296. When the contract is complete.**—The contract of membership may be made as well before as after the beginning of the corporation's existence, but does not become of binding force and effect as such until the corporation comes into existence and is made a party to it by accepting it. Those who sign and acknowledge the articles of associations having no capital stock, and proceed to a completion of the process of incorporation by filing the same, become members *eo instanti*, and no further assent by the corporation to the contract is necessary. The same may be said of subscribers to the capital stock of railroads, wagon roads and other corporations required to provide a proportion of their capital stock before the issuance of a certificate. To allow them to withdraw after the issuance of the certificate and before the formal acceptance by the agents of the corporation would be to allow them to perpetrate a fraud upon creditors as well as upon the state.

§ **297. Acceptance by the corporation.**—In other cases there must be acceptance on the part of the corporation or its agents before such agreements become binding. Such acceptance may be made by the board of directors after organization under general law. No particular formality is required to be observed in accepting subscriptions taken before complete organization. Any act which clearly signifies that a subscription is or has been recognized as valid is sufficient.[1] The offer is revocable

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an express promise to pay for them. Buckfield, etc., R. R. Co. v. Irish, 39 Me. 44; Penobscot, etc., R. R. Co. v. Bartlett, 12 Gray, 244; Seymour v. Sturgess, 26 N. Y. 134; Ft. Edward, etc., Co. v. Payne, 17 Barb. 567; Pittsburg, etc., C. R. Co. v. Gazzan, 32 Pa. St. 340.

[1] Strasburg R. R. Co. v. Echternact, 21 Pa. St. 220; Miller v. Wildcat, etc., Co., 52 Ind. 51; Thrasher v. Pike Co., 25 Ill. 393; Mt. Sterling, etc., Co. v. Little, 14 Bush. 429; Cal., etc., Co. v. Schafer, 57 Cal. 396; Poughkeepsie Co. v. Griffin, 24 N. Y. 150; Troy, etc., R. R. Co. v. Tibbits, 18 Barb. 297; Charlotte R. R. Co. v. Blakeley, 3 Strobh. L. 245; Pittsburgh, etc., Co. v. Gazzan, 32 Pa. St. 340; Wallingford, etc., Co. v. Fox, 12 Vt. 304; Strouse v. Flagg, 72 Ill.

at any time before acceptance. Death of one who has made a written offer to subscribe before its acceptance works a revocation.[1]

§ **298. Must have legal validity at time of acceptance.**—Though an agreement to subscribe for stock in a corporation to be formed be legal at the time it is made, if before the corporation comes into existence the contract which would arise from an acceptance of the offer contained in the agreement is made illegal by statute, the corporation cannot accept such offer so as to constitute a binding subscription. Nor does the designation of a trustee to whom payment is to be made, pending the organization of the corporation cure the invalidity of the transaction.[2] Nor can an action be maintained on such agreement which, though in its terms is legal, yet cannot be carried out without a violation of law.[3]

§ **299. Agreements to subscribe.**—An agreement between parties having in view the future formation of a corporation to subscribe for its shares of stock is a species of contract somewhat resembling, and yet distinct from, a contract of membership.

The corporation has no recourse upon the parties entering into such an agreement, and the latter do not become members unless they carry out their mutual

397; Gaff v. Winchester College, 6 Bush, 443; Perkins v. Union, etc., Co., 12 Allen, 273; Dayton, etc., Co. v. Roy, 13 O. St. 84. The bringing of a suit by the corporation to collect a subscription; Buffalo, etc., R. R. Co. v. Clark, 22 Hun, 359, and the receipt of installments for the stock; Bell's App., 115 Pa. 88; 8 Atl. Rep. 177, have been held sufficient. But the corporation can defeat a subscriber's action for stock by proving that it never accepted his subscription. Starrett v. Rock Island & V. R. R. Co., 65 Me. 374.

[1] Wallace v. Townsend, 43 O. St. 547; 3 N. E. 601.

[2] Knox v. Childersburg Land Co., 86 Ala. 180; 5 So. 578.

[3] Mercer Co. v. P. & E. R. R. Co., 27 Pa. St. 389; Thrasher v. Pike Co. R. R. Co., 25 Ill. 393.

agreement by having the certificates of stock or other *indicia* of membership issued to them.[1]

§ **300. Mutual agreements before incorporation.**—Agreements among themselves by parties who expect to subscribe for stock in a company when organized cannot be specifically enforced.[2] But it seems that an agreement by one person with others who contemplate becoming the incorporators of a company to take stock in such corporation, and pay for it, is a valid contract of subscription, and is enforceable by the corporation after it comes into being.[3] The promisors in such case might

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[1] Mt. Sterling Coal Road Co. v. Little, 14 Bush (Ky.), 425; Lake Ontario Shore R. R. Co. v. Curtiss, 80 N. Y. 219; Thrasher v. Pike County R. R. Co., 25 Ill. 393; Strasburg R. R. Co. v. Echternact, 21 Pa. St. 220. But see Twin Creek, etc., Road Co. v. Lancaster, 79 Ky. 552; Quick v. Lemon, 105 Ill. 578.

Where complainants alleged that they and certain other persons agreed to organize a corporation; that afterwards they organized a mining company, adopted by-laws and elected officers; that at a regular meeting of said corporation it was agreed that the capital stock should be divided among the different members thereof, complainants to receive a certain number of shares; that, subsequently, complainants were induced to resign from the board of directors in order to let in other investors, they being promised that their interests should remain the same; that thereafter they were excluded from the meetings and denied all knowledge of the affairs of the corporation; and that a new distribution of stock was made, the original distribution being disregarded and the shares of stock which had been allotted to complainants were allotted to others, it was held that all these allegations did not show any contract of subscription binding upon the corporation as such, and it could not be made a party defendant to an action to compel the issue of the shares of stock originally allotted to them or for damages in case such shares could not be issued. Summerlin v. Fronteriza S. M. & M. Co. U. S. Cir. Ct. W. D. Tex. 1890; 7 Ry. & Corp. L. J. 451. See also Joslin v. Stokes, 38 N. J. Eq. 31; Parsons v. Howard, 2 Woods, 1.

[2] Lake Ontario Shore R. R. Co. v. Curtiss, 80 N. Y. 219; Strasburg R. Co. v. Echternacht, 21 Pa. St. 220; Mt. Sterling Coal Road Co. v. Little, 14 Bush, 429; Cal. Sugar Mfg. Co. v. Schafer, 57 Cal. 396; Poughkeepsie & S. P. Pl. C. Co. v. Griffin, 24 N. Y. 150; Charlotte & S. C. R. Co. v. Blakely, 3 Strobh. L. 245; Pittsburg, etc., S. R. Co. v. Gazzan, 32 Pa. St. 340; Wallingford Mfg. Co. v. Fox, 12 Vt. 304; Chase v. Sycamore & R. R. Co., 38 Ill. 215; Sewall v. Eastern R. Co., 9 Bush. 5; Stowe v. Flagg, 72 Ill. 397; Gaff v. Winchester College, 6 Bush. 443; Perkins v. Union B. H. & E. Mach. Co., 12 Allen, 273; Carlisle v. Saginaw Valley & St. L. R. Co., 27 Mich. 315; Dayton W. V. & Turnp. Co. v. Coy, 13 O. St. 34.

[3] See Penobscot R. R. Co. v. Dummer, 40 Me. 172; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Griswold v. Peoria University, 26 Ill. 41; Stone v. Great Western

sue in their own names as designated agents or trustees of an express trust.[1]

But this case differs from that of mutual agreements between parties to make donations to a corporation to be thereafter formed. The latter case falls within the definition of a "contract made between two or more parties for the benefit of a third." Accordingly it is held that the corporation when formed can sue for and recover the promised donations.[2]

Oil Co., 41 Ill. 85; Heaston v. Cin. & Ft. W. R. Co., 16 Ind. 275; Buffalo & J. R. Co. v. Gifford, 87 N. Y. 294; Peninsular R. Co. v. Duncan, 28 Mich. 130; Kirksey v. Florida & G. Pl. Road Co., 7 Fla. 23; Selma & T. R. Co. v. Tipton, 5 Ala. 787; Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499; Thigpen v. Miss. Cent. R. Co., 32 Miss. 347; Gill v. Ky. & C. G. & S. Min. Co., 7 Bush. 635; Cuculla v. Union Ins. Co. 2 Rob. La. 573; Nulton v. Clayton, 54 Ia. 425; Robinson v. Edinboro Academy, 3 Grant's Cas. 107; Chater v. S. F. Sugar Ref. Co., 19 Ral. 219; Klein v. Alton & S. R. Co., 13 Ill. 514; Sawyer v. Upton, 91 U. S. 56; Weiss v. Maunch Chunk Iron Co., 58 P. St. 295. A contract of subscription to the capital stock of a corporation to be formed, reading: "We, the subscribers hereto . . . agree to pay the above amount" of the capital stock, and "for a faithful and full performance of our respective parts of the above contract we bind ourselves," followed by the name of each subscriber, with the amount of his subscription, is several, and a subscriber may be sued severally by the other party to the contract, who agreed to erect the building—a creamery —for the proposed corporation. Gibbons v. Grinsel (Wis.), 48 N. W. 255.

In another case defendant and others had agreed to organize a hotel company with a capital of $100,000, and that a meeting of stockholders should be called to organize the corporation and elect directors whenever $70,000 should be subscribed. One of a firm of general agents of a railroad company subscribed in the company's name, without authority, "for the amount of freight on furniture and material" shipped from certain ports, $10,000. He also subscribed in his own name a certain block "for a site for a hotel, if accepted and used for that purpose, $7,500, and in that case, cash $5,000." When $77,200 was subscribed, a meeting was had, and the agent voted those shares. It was held that since the agent's personal subscription was conditional, and the other unauthorized, the shares were illegally voted, and an independent subscriber, who did not take part in the organization, was not liable for his subscription, though the railroad and steamship company afterwards ratified the agent's subscriptions. California Southern Hotel Co. v. Russell (Cal.), 26 P. 105.

1 Infra, § 303.

2 Edinboro Academy, 3 Grant's Cas. 107; Ashuelot Boat, etc., Co. v. Holt, 56 N. H. 548; Griswold v. Peoria University, 26 Ill. 41; Reformed Prof. Dutch Church v. Brown, 17 How. Pt. 287; Hutchins v. Smith, 46 Barb. 235; Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546; Ives v. Sterling, 6 Metc. (Mass.), 310; Thompson v. Page, 1 Metc. (Mass.) 565.

§ **301. Measure of liability wanting.**—But in case of an agreement to subscribe for shares in a future corporation there is no means of determining what benefits, if any, accrue to the corporation from such agreement; and that question cannot be determined without a complete performance of the undertaking.

It is a mere common-law agreement, the validity and enforceability of which depends upon principles applicable alike to all executory contracts. It has been seriously doubted whether a corporation afterwards formed in pursuance of such agreements could sue for damages arising from their breach.[1]

§ **302. Difficult of enforcement where no agent is designated.**—In agreements entered into, prior to the organization of the corporation, unless an agent is by the same instrument constituted to receive the amounts subscribed, it is always difficult to ascertain the promisee, in whose name alone suit can be brought.[2]

§ **303. But a designated agent may sue.**—Where in the contract to take stock in a corporation to be formed an agent is designated as payee, he may sue in his own name on the agreement. He is thereby constituted the trustee of an express trust within the meaning of the statute.[3]

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[1] Troy & Boston R. R. Co. v. Tibbits, 18 Barb. 297; Erie, etc., R. R. Co. v. Owen, 32 Barb. 616; Dorris v. Sweeney, 64 Barb. 639; Athol Music Hall Co. v. Carey, 116 Mass. 473; Ashuelot Boot, etc., Co. v. Holt, 56 N. H. 548; Penobscot R. R. Co. v. Dummer, 40 Me. 172; Cross v. Pinckneyville Mill Co., 17 Ill. 54; Haskell v. Sells, 14 Mo. App. 91. Contra, Buffalo & J. R. R. Co. v. Gifford, 87 N. Y. 294, 299.

[2] This difficulty was pointed out in the case of Athol Music Hall Co. v. Carey, 116 Mass. 473. In that case a number of persons had entered into a contract whereby they mutually agreed to form a corporation and contribute a certain amount of capital each. Although the contract was incomplete and not binding *per se*, yet the passage of an act of the legislature subsequently, by which the company was incorporated, was held to make the subscribers shareholders, and as such liable to pay in the capital which they had agreed to contribute.

[3] West v. Crawford, 80 Cal. 20; Troy, etc., R. R. Co. v. Tibbits, 18 Barb. 297;

§ **304. Subscriptions taken by promoters.**—A promoter of a proposed corporation who solicits and procures stock subscriptions is an agent for the purpose of receiving the subscriptions; and a delivery to him to hold until the corporation is formed is, without any further act, a complete delivery, so that it becomes *eo instanti* a binding contract as between the subscribers.[1] An agreement that a corporation shall be formed and that the whole stock shall be issued to one of the promoters is not illegal as against public policy.[2] In such cases there is no contract with any corporation; merely an offer which may be revoked at any time.[3] If a party sign his name to the articles opposite a certain number of shares, and the articles be thus filed, it seems the corporation cannot hold him for a greater number upon a written contract made before such filing. Filing the articles containing the subscription for the lesser amount has the legal effect of a rejection of the offer for additional shares.[4]

The introductory clause of articles of association read thus:—"We, the undersigned, agree to take the stock in the amount set opposite our names in a company to

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Erie, etc., R. R. Co. v. Owen, 32 Barb. 616. Contra, Dorris v. Sweeney, 64 Barb. 639.

[1] Minn. T. M. Co. v. Davis Minn., 40 Minn. 110; 26 Am. & Eng. Corp. Cas. 61. Where the subscription sued on is made before the organization of the corporation, it is necessary to a recovery that the complaint should show that the steps essential to the bringing of the corporation into existence were duly taken. Richmond St. R. Co. v. Reed, 83 Ind. 9.

[2] King v. Barnes, 109 N. Y. 267. See Anderson's Case, 7 Ch. Div. 75; see Christian College v. Hendley, 49 Cal. 347.

[3] Thompson v. Page, 1 Metc. 565; Ives v. Sterling, 6 Metc. 310; McCauly v. Ballinger, 20 Johns. 89; East. P. Co. v. Vaughan, 20 Barb. 157; P. & S. P. R. Co. v. Griffin, 21 Barb. 454.

[4] Monterey & S. V. R. Co. v. Hildreth, 53 Cal. 123. In California Sugar Rfg. Co. v. Schafer, 57 Cal. 396, defendant had entered into a contract with others agreeing to subscribe for a certain amount of capital stock in a corporation to be thereafter organized. The corporation having been formed, sued upon the agreement, and the court decided against its right of recovery.

be organized for manufacturing and selling the Williamson Straw Stacker." Only seven of the eighty-three signers acknowledged the execution of the articles before a notary, and the instrument was duly recorded. It appeared $8,000 of stock was subscribed, and that the company was duly organized and a board of directors elected. It was held that only those who acknowledged the articles as required by statute became liable as members.[1]

§ 305. The corporation has no common-law remedy.—Where, after mutual agreements to form a corporation and contribute capital have been entered into by parties, a corporation is formed by others than themselves, it cannot sue directly on the amounts promised as a debt in the absence of a statutory provision giving a right of action to one for whose benefit a contract is made by two or more others. For these reasons courts of equity, it is sometimes said, will decree specific performance in such cases. But it is difficult to discover in such an arrangement any contract to which the corporation is a party of which specific performance can be decreed. If not a party for the purpose of suing at law, what standing has it as such in a court of equity for another purpose, which, when carried out, has exactly the same result, namely, the compulsory payment of the sums of money specified in the agreement ?[2]

§ 306. Agreements to contribute capital and form a corporation.—Where the agreement among the signers of an instrument is to pay fixed sums for a designated object of common interest, as to build a meeting house without

[1] Coppage v. Hutton, 124 Ind. 250; 7 L. R. An. 591.

[2] See People's Ferry Co. v. Belch, 8 Gray, 310; Goff v. Winchester College, 6 Bush. 445; Edinboro Academy v. Robinson, 37 Pa. St. 210.

the formation of a corporation, there is no difficulty in determining the exact terms of the undertaking to which they have bound themselves, and each promise is a consideration for the others. But when the undertaking involves the formation of a corporation which is a distinct and independent contract, unless it is described with great minuteness and detail, there is no means of determining from the contract the kind or character of corporation they have agreed to form, or its rights and powers, or the extent of their respective interests in it. So, agreements of the last-mentioned class may be said to be unenforceable and practically void.

But after the parties have progressed so far with the execution of their agreement as to organize a corporation under it, the corporation immediately becomes a party to it by relation, and may sue for the sums promised. But if the manner of entering into it and the form of contract is prescribed by statute, the specified requirements must, as we have seen, be substantially complied with.[1]

§ **307. Contracts to purchase shares.**—The ordinary contract between two parties for the sale and purchase of shares of stock in a corporation differs from a contract of membership; nor is it similar to either of the contracts hereinbefore mentioned. It is not a common-law contract and the right to make it, as well as the rules and regulations governing it, is either found in the statute or the corporation's by-laws or partly in both.[2]

§ **308. Agreements made with the corporation.**—Somewhat resembling an agreement among parties before incorporation to subscribe for shares of stock, but to be distinguished from it, is an agreement made with a cor-

[1] Supra, § 283.
[2] Infra, Ch. XIX.

poration itself to become a member or to subscribe for its shares at a future date.

Courts acting on equitable grounds have in some instances held such contracting binding to the extent of justifying a decree of specific performance. It vests an inchoate right of membership in the party agreeing to purchase, which becomes complete on due performance of the contract and compliance with the statute and by-laws by having the proper entries made in the books of the corporation.

But such contracts do not of themselves constitute the parties shareholders, and in a suit at law, the corporation cannot recover the amount of the shares as a debt. There can only be a recovery of damages for breach of contract. This might furnish an adequate remedy when the shares have an ascertainable market value; but in case of a new corporation whose stock has not, or has only to a limited extent, been issued, so as to acquire a market value, the measure of damages would be purely speculative.

§ **309. Contract of membership defined.**—The contract of membership in a corporation is one which of its own inherent quality and force entitles the holder to exercise the privileges of membership. It is an agreement entered into between a party competent to contract and a corporation whereby the former assumes *in presenti* a share of the latter's burdens and stipulates for a share of its benefits proportionate to his interest.[1] The con-

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[1] One who holds a note of a corporation containing the privileges, on certain dates and another time, of allowing said holder to exchange the same for one share of stock in the company, is not a stockholder, and has no vested interest in any particular stock; and when the corporation, subsequently, issues more stock before his time of election, and gives to the old stockholders the right of taking three shares of new issue for one of the old, this privilege does not inure to the holder of said note. Pratt v. American Bell Telephone Co., 141 Mass. 225; 5 N. E. 307.

tract is usually evidenced by a writing, but may be created by parol, and in some instances is implied from circumstances and relations. This principle of membership by implication does not conflict with the statutory provision requiring that corporations shall keep subscription books. The party by conducting himself as a member estops himself from setting up non-compliance with prescribed formalities and methods, and is bound upon the ground of part performance to the extent of benefits received and assumed interest.[1]

§ **310. Must contain essential parts of a contract.**—This exception, however, does not aid writings, which, though purporting to be subscriptions, are fatally defective as contracts or which are rendered invalid for lack of completion or on account of material alteration.[2]

A party will not be allowed to reduce by parol on the ground of mistake, the amount of stock which a subscription paper shows him to have contracted for, unless he can show that the mistake occurred without

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[1] See generally Sanger v. Upton, 91 U. S. 56; Wheeler v. Miller, 90 N. Y. 353; Boston, etc., R. R. Co. v. Wellington, 113 Mass. 79; Ex parte Beasley, 2 Mac. & G. 176; Clark v. Farrington, 11 Wis. 306; Jewell v. Rock Riv., etc., Co., 101 Ill. 48, 57; Haynes v. Brown, 36 N. H. 545; Chaffin v. Cummings, 37 Me. 76; Griswold v. Seligman, 72 Mo. 110; Musgrave v. Morrison, 54 Md. 161; Phoenix Warehousing Co. v. Badger, 67 N. Y. 294; Phil., etc., R. R. Co. v. Cowell, 28 Pa. St. 329; Cheltenham, etc., R. R. Co. v. Daniel, 2 Q. B. 281; West Cornwall v. Moffatt, 15 Q. B. 521. A director where required by the charter to be a stockholder is estopped from denying that he is such at least to the extent of qualifying him for the position by assuming and performing the duties of the position. Harwood's Case L. R. 13 Eq. 30; Stephenson's Case, 45 L. J. (Ch.), 488; In re British & Am. Tel. Co., L. R. 14 Eq. 316; In re Empire Assurance Co., L. R. 6 Ch. 469.

[2] As where the party signed incomplete articles of association. Dutchess, etc., R. R. Co. v. Mabbett, 58 N. Y. 397; where the articles were materially altered without consent of all the subscribers after being signed and before complete organization of the company. Burroughs v. Smith, 10 N. Y. 550. Where the names of the directors were left blank in the subscription paper. Consolts. Ins. Co. v. Newhall, 3 Foster & F. 130; where the number of shares was also left blank. See also Eakright v. Logansport, etc., Co., 13 Ind. 404.

negligence on his part; nor in any case where interests of others would be prejudiced by allowing him to do so.[1] But where he signed upon a misunderstanding of the entire scope and meaning of the contract, it will be set aside upon well-known principles.[2]

§ **311. Where law requires stock books to be kept.**—But by statutory regulations stock companies are in many states required to keep stock certificate books, showing the names of shareholders and the amount of stock held by each. Where that is the case, it is evident that at least an entry must be made by the party to be charged, in this case the corporation, and that no contract of membership is complete whatever the form of the subscription until a certificate of shares be issued, though it may be binding as between the parties. While the certificate is not the contract of membership, it is the best evidence of the extent of the holder's interest and membership; and the usual and regular manner of consummating the contract is by the issuance of a certificate. And it has been frequently held that if the charter or general law authorizes books of subscription

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[1] Diman v. Prov., etc., R. R. Co., 5 R. I. 130. One subscribed to bank stock on condition that at the end of a certain period, if he wished, he could return the stock, and receive back the note he had given in payment, and which contained the same stipulation. It was held that the stockholders, not having been misled, were bound by the contract. Jones v. Johnson, 86 Ky. 530; 6 S. W. 582.

But where it is alleged by a stockholder that the stock held by him has been cancelled, but no resolution or minute was adopted by the directors, and no record thereof made, and where it is further shown that the stockholder has continued to act as an officer after such alleged cancellation, is to be determined by the court, whose finding is conclusive. Topeka Mfg. Co. v. Hale, 39 Kans. 23; 17 P. 691.

[2] Jackson v. Haynor, 12 Johns. 469; Throughgood's Case, 2 Rep. 9; Foster v. Mackinnon, L. R. 4 C. P. 704; Rackford, etc., R. R. Co. v. Schumick, 65 Ill. 223. The admissions of a defendant are sufficient *prima facie* evidence that he became a shareholder. Dows v. Napier, 91 Ill. 44. The authenticity of subscriptions may be established by proof that calls made upon the subscribers have been paid. Union Hotel Co. v. Hersee, 79 N. Y. 454, 460.

for capital stock to be opened, parol contracts of subscription are invalid.[1]

§ **312. Issuance of certificate not essential.**—The failure to issue a certificate is not a valid defence to an action on the subscription.[2] This has often been held where the interests of creditors were involved. One who has become the owner of shares in a corporation is liable to creditors for the amount of unpaid capital due to the corporation without having had the certificates issued to him by the corporation.[3] The certificate only constitutes proof of property which may exist without it. When the corporation has agreed that a person shall be entitled to a certain number of shares in its capital, to be paid for in a manner agreed upon, and the person has agreed to take and pay for them accordingly, he becomes their owner by a valid contract made upon a valuable consideration.[4] But in order to maintain an action on the subscription, the corporation must be in a position to issue the certificate.[5] And the subscriber has his action on a valid contract of subscription to compel the corporation to issue the certificate to him.[6]

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[1] Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188; Fanning v. Ins. Co., 37 Ohio St. 339; Pittsburg, etc., R. R. Co. v. Clarke, 29 Pa. St. 126; Same v. Gazzan, 32 Id. 340.

[2] Burr v. Wilcox, 22 N. Y. 551; Chandler v. Northern Cross R. R. Co., 18 Ill. 190; Astoria & S. C. R. Co. v. Hill (Or.), 25 P. 379; Miller v. Wildcat G. R. Co., 52 Ind. 51; New Albany & S. R. R. Co. v. McCormick, 10 Ind. 499; Slepher v. Earhart, 83 Ind. 173; Paducah, etc., B'k v. Parks, 8 S. W. Rep. 39; 2 Pickle (Tenn.), 554, 842; Heaston v. Cin. & F. W. R. Co., 16 Ind. 275; Kennebec, etc., R. Co. v. Jarvis, 34 Me. 360; Chaffin v. Cummings, 37 Me. 76.

[3] Infra, § 561.

[4] Mitchell v. Beekman, 64 Cal. 118. See also Chaffin v. Cummings, 37 Me. 83; Spear v. Crawford, 14 Wend. 20; The Chester Glass Co. v. Dewey, 16 Mass. 94; In re South Mountain Consolidated Min. Co., 7 Sawy. 30.

[5] McCord v. Ohio & Miss. R. R. Co., 13 Ind. 220; Burrows v. Smith, 10 N. Y. 550; James v. Cin. H. & D. R. R. Co., 2 Disney, 261.

[6] Buffalo, etc., R. R Co. v. Dudley, 14 N. Y. 336, 347; Mitchell v. Beekman, 64 Cal. 117.

§ 313. **Nor form of contract important.**—There is no particular form required in a written contract of membership. It should, however, contain the names of the contracting parties, the amount of interest contracted for, and all the terms and conditions not found in the constating instruments.[1] If the charter requires subscriptions for stock to be made upon subscription books, the mere signing of a separate agreement to take stock will not support an action by the corporation against the party signing the agreement.[2]

But where the party whom it is sought to charge as a subscriber has assumed the relation of a stockholder upon such agreement, he cannot set up the irregularity and failure to comply with the legal formality of making the same in the subscription books. Where a party had paid $1,000 which was applied as capital stock of a bank, receiving at the time a certificate reciting that upon the payment of the balance he should be entitled to 100 shares of stock, of the par value of $100 each, and afterwards denied his liability as a subscriber and sought to recover back the $1,000, he was held liable to the bank and its creditors as a stockholder, notwithstanding a provision in the statute under which the corporation was organized, that "no certificates representing shares of stock shall be issued nor shall such stock be considered as acquired until the whole sum of money which such certificate purports to represent shall be paid into the corporation."[3] Substantial compliance with statutory requirements is sufficient.[4]

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[1] Nulton v. Clayton, 54 Da. 425; Ashtabula, etc., R. R. Co. v. Smith, 15 Ohio St. 328; Bates v. St. Western Tel. Co. (Ill.), 25 N. E. 521.

[2] Charlotte R. R. Co. v. Blakeley, 3 Strobh. S. Cas. 245.

[3] Ross v. B'k of Gold Hill, 20 Nev. 191; 26 Am. & Eng. Cas. 54, n.

[4] Cayaga L. R. Co. v. Kyle, 64 N. Y. 185; Boston, etc., R. Co. v. Wellington, 113 Mass. 79; Ashtabula, etc., R. R. Co. v. Smith, 15 O. St. 328; Clark v. Continental Imp. Co., 57 Ind. 135; Nulton v. Clayton, 54 Ia. 524.

Subscriptions need not necessarily be made in the subscription books authorized to be opened. Subscriptions taken on a sheet of paper which was afterwards placed in the record book of the company and the names of the subscribers, and the amount subscribed by them entered in the book by commissioners appointed to open books of subscription constitute a sufficient compliance with the statute in such case.[1]

§ **314. Neither party can withdraw.**—After there has been a binding subscription, neither party can withdraw from the obligation, and the subscriber can compel a delivery to him of the evidence of his membership—the certificate—by the corporation, while the latter may compel payment for the shares and treat the subscriber as a shareholder subject to assessments to meet the corporate liabilities.[2]

§ **315. Membership in benevolent etc., societies.**—In the case of incorporated, benevolent and friendly societies the contract of membership consists in its charter, constitution and by-laws, and a member becomes such by signing his name.

In mutual, beneficial and co-operative associations, a certificate of membership to subsist so long as the recipient complies with the by-laws, rules and regulations is the usual form.[3]

§ **316. Collateral parol agreement not binding.**—In stock corporations, a subscription usually precedes issuance of the certificate which constitutes one a member.

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[1] Woodruff v. McDonald, 33 Ark. 97. The subscription may be put in form from disconnected memoranda by a person authorized by the subscribers to act in their behalf for that purpose. Iowa, etc., R. R. Co. v. Perkins, 28 Iowa, 281.

[2] Spear v. Crawford, 14 Wend. 20; Beecher v. Dillsburg, etc., v. R. R. Co., 76 Pa. St. 306; Marsh v. Borroughs, 1 Woods, 463; Busey v. Hooper, 35 Md. 15; Cass. v. Pittsburg, etc., R. R. Co., 80 Pa. St. 31.

[3] See next chapter.

The term subscription implies a writing and cannot be proven by parol until the absence of the subscription paper has been accounted for.[1] Nor can any parol agreement or condition made before or contemporaneous with the subscription be set up to vary its terms.[2] But parol evidence explanatory of the situation of the parties and subject matter and of alterations and erasures in the subscription paper is admissible. The erasure or alteration of a subscription does not *per se* prevent a suit upon it. Explanatory parol evidence is admissible.[3]

§ 317. **General rules governing contracts.**—Written contracts of membership as evidence and as foundations for legal proceedings, are governed by the same rules as other contracts in writing.

Whatever formalities are required by the charter or general law under which a corporation has been formed on the subject of becoming a member must be complied with. Neither party is bound by a subscription which substantially varies from statutory requirements.[4]

§ 318. **Informalities may be waived.**—All informalities

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[1] Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188, 191; Pittsburg, etc., R. R. Co. v. Clarke, 29 Pa. St. 146, 152; Pittsburg, etc., R. R. Co. v. Gazzam, 32 Pa. St. 340.

[2] Fairfield County Tp. Co. v. Thorp, 13 Conn. 173; McClure v. People's Freight Ry. Co., 90 Pa. St. 271; Wight v. Shelby R. R. Co., 16 B. Monr. 4; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Miss., etc., R. R. Co. v. Cross, 20 Ark. 443; Conn. etc., R. R. Co. v. Bailey, 4 Vt. 465; New Albany R. R. Co. v. Fields, 10 Ind. 187; Meth. Epis. Church v. Town, 49 Vt. 29; Evansville, etc., R. R. Co. v. Posey, 23 Ind. 363; Roche v. Roanoke Seminary, 56 Ind. 198; Eakright v. Logansport, etc., R. R. Co., 13 Ind. 404, 407; Haskell v. Sells, 14 Mo. App. 91; North Carolina R. R. Co., v. Leach, 4 Jones (Law.), 340; Smith v. Tallahasse, etc., Plankroad Co., 30 Ala. 650; Ridgefield, etc., R. R. v. Brush, 43 Conn. 98; Thigpen v. Miss. Cent. R. R. Co., 32 Miss. 347; White Hall, etc., R. R. Co. v. Myers, 16 Abb. Pr. N. S. 34; Noble v. Callender, 20 O. St. 199.

[3] Greer v. Chartiers Ry. Co., 96 Pa. St. 391; Johnson v. Wabash, etc., Plankroad Co., 16 Ind. 389; Sodus Bay., etc., R. R. Co. v. Hamlin, 24 Hun, 390.

[4] West v. Crawford, 80 Cal. 20; Monterey, etc., R. R. Co. v. Hildreth, 53 Cal. 123.

in the contract of subscription are waived by acceptance of the stock certificate except a total absence of authority on the part of the corporation to issue it.[1]

A convenient test of the question whether one is liable as a stockholder is the position in which the contract in question has placed the corporation. If it is bound by its terms to receive the party as a member for purposes of voting or enjoying other privileges of membership, it is a valid subscription.[2] The objection that the whole capital stock has not been subscribed may be waived like other conditions. Such waiver may be either express or implied; it may consist either in acts or declarations of the subscriber.[3] Acting as director,

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[1] Hamilton, etc., Plank-road Co. v. Rice, 7 Barb. 157; A subscription made in a blank book and afterwards accepted by the corporation but not transferred to its regular subscription books was held valid. Brownlee v. Ohio, etc., R. R. Co., 18 Ind. 68.

So when at the town meeting the objects of the meeting and the nature of the corporate enterprises having been made known numerous persons wrote their names and the amounts for which they were willing to subscribe on slips of paper which were afterwards transcribed by the company into a book of the company, it was held that this book became the original contract of subscription. Iowa & Minn. R. R. Co. v. Perkins, 28 Iowa, 281; Stuart v. Valley R. R. Co., 32 Gratt. 146.

A similar effect was given to a book made up of loose sheets of paper on which parties had written their subscriptions. Woodruff v. McDonald, 33 Ark. 99.

[2] Parker v. Northern Cent. R. R. Co., 33 Mich. 23; Northern Cent. Mich. R. R. Co. v. Eslow, 40 Id. 222. See University of Des Moines v. Livingston, 57 Ia. 307; Tarrett v. Rockland Ins. Co., 65 Me. 374.

[3] Emmett v. Springfield, J. & P. R. R. Co., 31 O. St. 23; Hager v. Cleveland, 36 Md. 476. International Fair Exp. Assn. v. Walker, (Mich.) 47 N. W. 338. The articles of association provide that the "capital stock of said corporation shall be $50,000, of which $14,500 has been subscribed, * * * and the residue may be issued and disposed of as the board of directors may from time to time order and direct." The company had begun business before defendant subscribed for his stock. *Held*, that the implied condition that no subscriptions were to be paid until the whole capital stock was subscribed could not arise, and defendant was bound to pay his subscription when called upon for it by the directors. Arkadelphia Cotton-Mills v. Trimble (Ark.), 15 S. W. 776.

The expenditure of money in the erection of the building to be used by a proposed corporation by the parties to whom the subscription to the capital stock run is a sufficient consideration to support the promise of the subscribers. Gibbons v. Grinsel (Wis.), 48 N. W. 255.

attending meetings and encouraging the contracting of corporate debts, paying assessments with full knowledge of all the facts;[1] acting as president of the corporation;[2] participating in the affairs and management[3] have been held sufficient evidence of waiver. But equivocal acts capable of other import than that the regularities and defects in the organization are not to be taken advantage of will not deprive him of the benefits of these defenses.[4]

§ 319. **Subscriptions in escrow.**—There is a difference between a subscription and a contract of subscription placed in escrow. The latter is in no sense a subscription until a second delivery. It may, moreover, be itself either absolute or conditional, and its second delivery is nearly always contingent upon the performance of a condition without which it does not take effect. The fact that the delivery is made to an agent of the corporation engaged in taking subscriptions[5] does not take away the

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[1] Morrison v. Dorsey, 48 Md. 461. The depositors of a savings bank agreed to incorporate it as a bank of capital. Books were opened for subscription of stock, depositors being given the preference, and funds in the bank were accepted in payment. A large amount of stock was taken, and the money paid in, and the persons subscribing, without waiting for all the stock to be taken, organized and began business. The subscription to the stock was unconditional. The bank was forced to suspend, and on liquidation dividends were paid on deposits, excluding those whose deposits were applied on stock. It was held that such stockholders were estopped to say that their subscriptions were conditional on the whole amount of the stock being taken, and they could not claim any rights as depositors. Dallemand v. Odd Fellows, etc., Bank, 74 Cal. 598; 16 P. 497.

[2] Corwith v. Culver, 69 Ill. 502.

[3] Sharpley v. Louth & E. R. Ry. Co., L. R. 2 Div. 663; Butler v. Aspinwall, 33 Fed. Rep. 217.

[4] See Pitchford v. Davis, 5 Mees. & W. 2; Wontner v. Sharp, 4 C. B. 404; Bean v. Am. L. & Tr. Co. (N. Y.), 26 N. E. 11; New H. Cent. R. R. Co. v. Johnson, 30 N. H. 390; Livesey v. Omaha Hotel Co., 5 Neb. 50; Oldtown & L. R. R. Co. v. Veazie, 39 Me. 571; Memphis Br. R. R. Co. v. Sullivan, 57 Ga. 240; Atlantic Cotton Mills v. Abbott, 63 Mass. 423; May v. Memphis, Br. R. R. Co., 48 Ga. 109; Temple v. Lemon, 112 Ill. 51; 1 N. E. 268.

[5] Cass v. Pittsburg, etc., R. R. Co., 80 Pa. St. 31; or to a director; Ottawa, etc., R. R. Co. v. Hall, 1 Bradw. 612.

true character of the delivery and render it a delivery to the corporation. But it is otherwise if the delivery be to a commissioner.[1] The delivery in escrow has the same effect as a like delivery of a deed to real estate. Without the performance of the condition no estate passes in the one case and there is no subscription in the other. A delivery without performance of the condition is void and ineffectual.[2]

§ 320. **Conditional subscriptions.**—Contracts to take effect upon condition are not subscriptions but merely offers to become shareholders, which become subscriptions when accepted by the corporation by a performance of the condition.[3] Where the time for the performance of a condition is limited and there is not a performance within the limited time by the corporation, the other party is released from his proposition.[4]

Such conditions in order to shield a party from liability as a shareholder must be such the performance of which is not contrary to the terms of the charter or provisions of the general law or against public policy.[5] A contemporaneous promise by the corporation which, if carried out, would necessitate an *ultra vires* act is

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[1] Wright v. Shelby R. R. Co., 16 B. Monr. 4; and it has been held that commissioners acting under statutory authority to take subscriptions to a railroad company could take no other than unconditional subscriptions. Pittsburg, etc., R. R. Co. v. Bigger, 34 Pa. St. 455.

[2] The condition and its non-performance may be shown by parol as where the party made an agreement with the agent at the time of signing a blank that his subscription should not be binding until he should have an opportunity of seeing and approving the heading of the subscription. Bucher v. Dillsburg, etc., R. R. Co., 76 Pa. St. 306.

[3] Ashtabula, etc., R. R. Co. v. Smith, 15 O. St. 328.

[4] Ticonic Water Power Co. v. Lang, 63 Me. 480. See Penobscot, etc., R. R. Co. v. Dunn, 39 Id. 589; Penobscot R. R. Co. v. White, 41 Id. 512.

[5] See Butternuts, etc., Turnp. Co. v. North, 1 Hill, 518; Fort Edward, etc., P. R. Co. v. North, 15 N. Y.

not valid, is not a condition, and is no defense to an action for the price of the shares.[1]

§ **321. Conditions in municipal subscriptions.**—Subscriptions by cities, towns and counties in aid of railroads, canals and other enterprises of a public nature are frequently made subject to a condition. The due performance of such conditions are as binding upon the company to which they are made, as when inserted in the contract of a private individual.[2] The non-performance of a condition precedent which it is legal to insert, is a good defence to an action on the subscription as in other cases,[3] and the same general principle applies that substantial compliance is sufficient.[4]

§ **322. Power of corporate officers to insert conditions.**—While the contract is not self executing and does not take effect until executed by the proper officer or representative of the municipality,[5] yet as to such terms as have not been definitely fixed in the statute authorizing the submission, the agent has a certain degree of discretion

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[1] Johnson v. Crawford, F. K. & Ft. W. R. Co., 11 Ind. 280; Peters v. Lincoln, & N. W. R. Co., 14 Fed. Rep. 319; Baile v. Calvert College Ed. Soc., 47 Md. 117.

[2] Portland, etc., R. R. Co. v. Inhabitants of Hartford, 58 Me. 23; Brocaw v. Gibson Co., 73 Ind. 543; Noesen v. Port Washington, 37 Wis. 168; Perkins v. Port Washington, 37 Id. 177; Red Rock v. Henry, 106 U. S. 596; Atchison, etc., R. R. Co. v. Phillips, Co., 25 Kan. 261; Compare Memphis, etc., R. R. Co. v. Thompson, 24 Kan. 170; Shurtleff v. Wiscasset, 74 Me. 130

[3] As that a railroad shall run through or be located in a county or city. State v. Hancock County, 11 O. St. 183; Oregon v. Jennings, 119 U. S. 74; Chicago, etc., R. R. Co. v. Marseilles, 84 Ill. 145; Mellen v. Town of Lansing, 19 Blatch. 512; Bucksport, etc., R. R. Co. v. Brewer, 67 Me. 295.

[4] As where the road was completed within the time except about one mile of the distance and the train of the company for that distance ran over the track of another road. People v. Holden, 82 Ill. 93. See also Hadgman v. St. Paul, etc., R. Co. 23 Minn. 153, where it was held that the completion of the road did not depend upon the building of a bridge across a stream, other provision for crossing it being made. See also Concord v. Portsmouth, etc., 92 U. S. 625; R. R. Co. v. Falconer, 103 U. S. 821.

[5] Wadsworth v. St. Croix Co., 4 F. 378. Cumberland, etc., R. R. Co. v. Bar-

in fixing them.[1] But the corporate or county authorities cannot change the absolute terms of a proposition after it has been voted upon, or insert additional conditions, or resubmit with new conditions.[2]

§ **323. When taken by commissioners.**—Statutes sometimes provide for the opening of books by commissioners for the purpose of receiving subscriptions to the capital stock of corporations. Such commissioners have no other powers than those given them in the act and must give all equal opportunities for subscribing; nor can they themselves obtain any priority over others.[3] Where the commissioners have a discretion and it has been honestly exercised, no one has any legal cause for complaint;[4] and slight irregularities in their proceedings will be disregarded.[5] The authority and functions of commissioners cease upon the organization of the corporation; and they are superseded by its constituted authorities.[6]

§ **324. Conditions implied in subscriptions before incorporation.**—Under the class of conditional subscriptions properly fall all subscriptions made to the capital stock of a corporation before its formation, the implied con-

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ren Co., 10 Bush (Ky.), 604; Bates Co. v. Winters, 97 U. S. 83; B'd of Commrs. v. Cottingham, 17 N. E. Rep. 855.

[1] As in time and manner of payment. Syracuse, etc., v. Seneca, etc., 86 N. Y. 317. In Winter v. City Council, etc., 65 Ala. 403, it was held that where a maximum amount for which bonds might be issued was fixed by the vote, the corporate officers might issue them for a less amount.

[2] Madison County Ct. v. Richmond, etc., R. R. Co., 80 Ky. 16. Falconer v. Buffalo, etc., R. R. Co., 69 N. Y. 491. See also Carroll v. Smith, 111 U. S. 556.

[3] Walker v. Devereux, 4 Paige, 229; Brower v. Pass. Ry. Co., 3 Phil. 161.

[4] Saugatuck, etc., Co. v. Westport, 39 Conn. 337, 348.

[5] As a failure to take the statutory oath; Hallman v. Williamsport, etc., Co., 9 Gill. & J. 462.

[6] James v. Cin., etc., R. R. Co. v. Duncan, 28 Mich. 130; Hardenburg v. Farmers', etc., B'k, 3 N. J. Eq. 68; Walker v. Devereau, 4 Paige, 229; Crocker v. Crane, 21 Wend. 211; Wellesburg, etc., Co. v. Hoffman, 9 Md. 559; Smith v. Bangs, 15 Ill. 399; State v. Lehre, 7 Rich. L. 234.

dition in all such cases being that a corporation shall be formed, that is, the particular corporation with reference to which and to whose charter or articles of incorporation the contract is made. When these terms are fulfilled, no further acceptance on the part of the corporation is necessary. But in order that such contract shall become binding by virtue of a completion of the process of incorporation under general law, it is necessary either that the amount of stock agreed to be taken shall be stated in the articles signed by the party or such reference made to them in the contract as shows that their provisions were fairly understood.[1]

§ **325. The fixed amount of capital must have been subscribed in good faith.**—The full capital required to be subscribed before calling for the payment of subscriptions must consist of actual unconditional subscriptions. If any part required to constitute the entire amount is either fictitious or subject to conditions precedent no calls or assessments can be collected until the fixed amount is reached in absolute *bona fide* subscriptions. The amount obtained in order to authorize the collection of assessments must consist of subscriptions by persons at least apparently able to pay their assessments.[2] But the mere fact that some of the subscribers had proven to be insolvent was held to be no defense to the payment of subscriptions by others in a case where the insolvents had been accepted as subscribers by the agents of the corporation in good faith.[3]

But in case of an increase of capital by a corporation under authority in its charter, a subscriber for stock to

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[1] Supra, § § 299, 300.
[2] Central Turnpike Co. v. Valentine, 10 Pick. 142.
[3] Ridgefield, etc., R. R. Co. v. Brush, 43 Conn. 87; Penobscot R. R. Co. v. Dummer, 40 Me. 172; Penobscot R. R. Co. v. White, 41 Me. 512; Salem Mill Dam Co. v. Ropes, 9 Pick. 187.

be issued by virtue of the increase may be compelled to pay the subscription price of his shares whether the entire amount of the increase is subscribed for or not. The reason for the distinction between this class of subscriptions and those to the original capital is, that the corporation has already begun business and the immediate use of the money to be derived from the new subscriptions may have been the main inducement for the increase.[1] But subscriptions to an increase of capital stock in national banks are governed by the provisions of Rev. Stat. U. S. § 5442, and Act of Congress, May 6, 1886, and where an increase is attempted to be made without obtaining the consent of two-thirds of the stock, the payment in full of the amount, of such increase, and the certificate and approval of the comptroller of the currency, as required by those statutes, the proceedings are invalid, and preliminary subscriptions to such increase cannot be enforced. Such a subscription is impliedly conditioned on the subscription of the whole amount of the proposed increase, and on the compliance by the corporation with all the requirements of the statutes necessary to make the increase of stock valid. And in case of non-compliance with such requirements there is a failure of consideration.[2]

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[1] Clarke v. Thomas, 34 O. St. 46; Nutter v. Lexington, etc., R. R. Co., 6 Gray, 85; See Reed v. Memphis Gayoso Gas Co., 9 Heisk. (Tenn.) 545; Avegne v. Citizens B'k, 40 La. Ann. 799.

[2] Winters v. Armstrong, 37 F. 508. To same effect Scheerenberg v. Stephens, 32 Mo. App. 314; Nichols v. Same, Id. 330; and it was held that one who subscribes and pays for a specified number of shares of a "proposed increase" of the capital stock of a national bank, which increase is in fact never issued, and to whom the bank officials transfer, instead, old stock of the bank without his knowledge or consent, is not a "shareholder" within the meaning of § 5151, imposing individual liability on the shareholders for the debts of national banks. The fact that the subscriber for the new shares received a dividend on the old shares so transferred to him does not estop him from denying his liability as a shareholder, where such dividend was received in the belief that it was paid to

§ 326. **Requirement founded on justice and public policy.**—These rules as to implied conditions in subscriptions have been held inflexible both on the ground of public security and protection of the other subscribers, and cannot be evaded,[1] they are founded on a plain dictate of justice and the strict principles regulating the obligations of contract.[2]

§ 327. **Proof of compliance herein.**—It is held that a corporation in suing on the contract must aver that the full capital stock has been subscribed;[3] and that the corporation has the burden of proving the subscriptions for the full capital stock.[4] It is well settled that the

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him by virtue of his subscription to the new stock. Stephens v. Follett, 43 F. 842.

[1] Livesey v. Omaha Hotel, 5 Neb. 50; Rockland Mt., etc., Co. v. Sewall, 78 Me. 167. Peoria & R. I. R. R. Co. v. Preston, 35 Ia. 118, "Unless a contrary intention appears, expressly or by implication, either in the charter or the contract of subscriptions;" Shurtz v. Schoolcraft & T. R. R. Co., 9 Mich. 269; New York H. & N. R. R. Co. v. Hunt, 39 Conn. 75; Hale v. Sanborn, 16 Neb. 1; Haskell v. Worthington, 7 S. W. Rep. 481; Halsey, etc., Co. v. Donovan, 57 Mich. 318; Stoneham Br. R. R. Co. v. Gould, 68 Mass. 277. Rev. St., Tex., Art. 585, which confers the general management of a corporation on the directors, and which empowers them to dispose of the unsubscribed capital stock "in such manner as the by-laws may prescribe," does not, in the absence of any by-laws on the subject, authorize the directors to enforce an unaid subscription before the capital stock is all taken. Orynski v. Loustaunan (Tex.), 15 S. W. 674.

[2] Bray v. Farwell, 81 N. Y. 600, 608.

[3] Hain v. North W. G. R. Co., 41 Ind. 196. See also Selma M. E. M. R. R. Co. v. Anderson, 51 Mass. 829; Hughes v. Antietam Mfg. Co., 34 Md. 318, 332; Topeka Bridge Co. v. Cummings, 3 Kan. 55; Allman v. Havana R. & E. R. R. Co., 88 Ill. 521; Temple v. Lemon, 112 Ill. 51; Littleton Mfg. Co. v. Parker, 14 N. H. 543; Hendrix v. Academy of Music, 73 Ga. 437; Gontoocook Valley R. R. Co. v. Barker, 32 N. H. 363; Prop. of N. Bride v. Story, 6 Pick. 45; Belfast & M. L. R. R. Co. v. Cottrell, 66 Me. 185; Rockland, etc., Co. v. Sewall, 14 Atl. Rep. 939; Memphis Br. R. R. Co. v. Sullivan, 57 Ga. 240; Fox v. Allensville C. S. & V. T. Co., 46 Ind. 31.

[4] Cent. Turnp. Co. v. Valentine, 10 Pick. 142; Fry's Exrs. v. Lexington & B. S. R. R. Co., 2 Metc. (Ky.) 314. Compare Monroe v. Fort W. J. & S. R. R. Co., 28 Mich. 272.

A. subscribed to certain shares of increased capital stock of a corporation, upon condition that the subscription should not become binding unless the full amount of the increase were subscribed. Among the subscriptions were two by married women, which, of course, were void and were never paid. It was held that,

records of the corporation, until impeached, are sufficient evidence that the full capital stock has been subscribed.[1] Evidence is admissible, however, to destroy the effect of such records. But the certificate of commissioners that full subscription has been made cannot be questioned, even though the subscriptions of married women have been counted.[2]

§ **328. Cases in which the objection does not lie.**—Where a subscription is made before incorporation on paper fixing the capital stock, at a given sum which is procured, the failure to secure full subscription as fixed in the charter is no defense.[3] This condition like others, may be waived by significant acts of acquiescence.[4] Part payment is generally a waiver, though it has been held that parties may recover back what they have paid, if the corporation has failed to obtain subscription for the entire capital.[5] There is no implied condition that the full amount shall be obtained where a subscription contains an express promise to pay;[6] but if the corporation is incorporated with a less capital stock than that specified when the subscription was made, the subscriber is not bound by it.[7]

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as to one who had not by any act waived this defect, the condition had not been complied with. Appeal of Hahn (Pa.), 7 A. 482.

But where part of conditional subscriptions to stock were invalid, but were treated as binding and good by other subscribers, the latter will not be permitted to set up the invalidity of those subscriptions to show that the condition had not been fulfilled. Appeal of Cornell, 114 Pa. 153; 6 A. 258.

[1] Ridgefield & N. Y. R. R. Co. v. Brush, 43 Conn. 86; Penobscot R. R. Co. v. Dummer, 40 Me. 172; Same v. White, 41 Me. 512.

[2] Harlem Canal Co. v. Seixas, 2 Hall (N. Y.) 504; Same v. Spear, 2 Hall, 510; Litchfield B'k v. Church, 29 Conn. 137; Marlborough Br. R. R. Co. v. Arnold, 9 Gray, 159; Land v. Brainerd, 30 Conn. 565.

[3] Belton, etc., Co. v. Sanders, 70 Tex. 699; 6 S. W. Rep. 134.

[4] Dallemand v. Odd Fellows', etc., B'k, 74 Cal. 598; 16 Pac. Rep. 497.

[5] Winters v. Armstrong, 37 Fed. Rep. 508.

[6] Skowegan & A. R. R. Co. v. Kinsman, 77 Me. 370.

[7] Santa Cruz R. R. Co. v. Schultz, 53 Cal. 106. But see New Castle & A. T.

The rule has no application where the charter authorizes the organization and commencement of business after a certain amount of the capital stock has been subscribed, such provision being equivalent to express authority to the corporation to call in the subscription, freed from conditions.[2]

§ 329. When the implied becomes an express condition.— On the contrary, a provision in the subscription itself, that a certain amount of capital stock shall be subscribed before payment may be demanded, is generally given legal effect like other expressed conditions, and until it is fully complied with, the subscriber is not liable. And on the same principle, if by the terms of the subscription payment is not to be demanded until a certain amount is subscribed, it is enforceable when that amount is secured although less than the full capital stock.[3] The same rule applies to conditions that sufficient subscription for a corporate

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Co. v. Bell, 8 Blackf. (Ind.) 584; York & C. R. R. Co. v. Pratt, 40 Me. 447; Oregon Cent. R. R. Co. v. Scoggin, 3 Or. 161; Cheraw & C. R. R. Co. v. White, 10 S. C. 155; Chubb v. Upton, 95 U. S. 665, 668.

[1] Hale v. Sanborn, 16 Neb. 1; Shurtz v. Schoolcraft & T. R. R. Co., 9 Mich. 269; Haskell v. Worthington, 94 Mo. 560; 7 S. W. Rep. 481; New York H. & N. R. R. Co. v. Hunt, 39 Conn. 75; Halsey, etc., Co. v. Donòvan, 57 Mich. 318.

[2] Hunt v. Kansas & M. B. Co., 11 Kan. 412; Sedalia, Warsaw, etc., Ry. Co. v. Abell, 17 Mo. App. 645; Schenectady & S. P. R. R. Co. v. Thatcher, 11 N. Y. 102; Hamilton & D. P. R. R. Co. v. Rice, 7 Barb. 166; Perkins v. Sanders, 56 Miss. 733; Rensselaer & W. P. R. Co. v. Wetsel, 21 Barb. 56. See also Hoagland v. Cin. & F. W. R. R. Co., 18 Ind. 452; Penobscot & K. R. R. Co. v. Bartlett, 12 Gray, 244; Hanover K. & S. R. R. Co. v. Haldeman, 82 Pa. St. 36; Boston B. & G. R. R. Co. v. Wellington, 113 Mass. 79; New Haven & D. R. R. Co. v. Chapman, 38 Conn. 65; Lexington & W. C. R. R. Co. v. Chandler, 54 Mass. 311; Minor v. Mechanics' B'k, 1 Peters, 46; Jewett v. Valley Ry. Co., 34 O. St. 601; Ill. R. R. Co. v. Zimmer, 20 Ill. 654; Williamette F. Co. v. Stannus, 4 Or. 261. Cf. Galveston Hotel Co. v. Balton, 46 Tex. 633. Where the court said:— "There were good reasons for organizing the company to be found in the increased facility of thereby raising the subscriptions to the amount fixed for the capital stock and of other preliminary preparations for the execution of the work, when the subscription should reach that amount."

[3] Bucksport & B. R. R. Co. v. Buck, 65 Me. 536. See also Ia. & Minn. R. R. Co. v. Perkins, 28 Ia. 281.

purpose shall be secured.[1] A subscription to pay "when required" renders the subscription payable before the full capital stock is subscribed.[2]

§ **330. What subscriptions to be counted.**—Subscriptions containing a condition precedent should not be counted in determining whether the full capital has been subscribed, with a view to enforcing subscriptions.[3] The same rule applies to invalid subscriptions,[4] and to those of married women, where common law disabilities remain, infants, and persons of unsound mind.[5] This objection is not available, however, to the subscriber with knowledge that the subscriptions of married women were counted.[6] *Ultra vires* subscriptions of other corporations are excluded from the estimate;[7] as are those of insolvents, who were such at the time of subscription.[8] If solvent at the time of subscribing, subsequent insolvency is immaterial.[9] With respect to subscriptions payable in labor and materials the prevailing view is, that where they were made in good faith they should be counted; since it is often necessary to resort to this method of carrying out corporate enterprises.[10]

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1 People's Ferry Co. v. Balch, 74 Mass. 203.

2 Cheraw & C. R. R. Co. v. Garland, 14 S. C. 63. Compare Chases' Pat., etc., Co. v. Boston, etc., Co. (Mass.), 28 N. E. 300 (Sept. 1891).

3 Troy & G. R. R. Co. v. Newton, 74 Mass. 596; Oskaloosa Agri. Works v. Parkhurst, 54 Ia. 357; Cabot & W. S. B. v. Chapin, 60 Mass. 50; Brand v. Lawrenceville, etc., R. R. Co., 77 Ga. 506; 1 S. E. Rep. 255; N. Y., etc., R. R. Co. v. Hunt, 39 Conn. 75.

4 Belfast & M. L. R. R. Co. v. Cottrell, 66 Me. 185. Compare Swartwout v. Mich. Air Line R. R. Co., 24 Mich. 389.

5 Phillips v. Covington & Cin. Bridge Co., 2 Metc. (Ky.) 219; Appeal of Hahm (Pa.), 7 Atl. Rep. 482.

6 Appeal of Cornell, 114 Pa. St. 153; 6 Atl. Rep. 258.

7 Berry v. Yates, 24 Barb. 199.

8 Lewey's Island R. R. Co. v. Bolton, 48 Me. 451; Belfast, etc., Ry. Co. v. Inhab. of Brooks, 60 Me. 568.

9 Salem M. D. Corporation v. Ropes, 26 Mass. 187.

10 Phillips v. Covington & Cin. Bridge Co., 2 Metc. (Ky.) 219; Penobscot R. R. Co. v. Dummer, 40 Me. 172; Same v. White, 41 Me. 512; Ridgefield & N. Y.

§ **331. Express conditions in preliminary subscriptions.**— If in addition to these implied conditions there are express conditions in the charter or articles, or other paper containing the terms of the contract to be performed either by the corporation or third parties before the subscription takes place prior to performance of these must be shown in order that the formation of the corporation amounts to a binding acceptance of the offer.[1] Still the subscriber cannot withdraw after acceptance of the offer by the corporation subject to the conditions until the latter has had reasonable time and opportunity to perform the condition and convert it into a complete obligation.[2] But unreasonable delay will release the subscriber. All such offers may be retracted and recalled if acceptance or performance is unreasonably deferred.[3] In such case a notification of withdrawal to the secretary or other officer in charge of the subscription list constitutes a withdrawal.[4]

§ **332. Conditions and stipulations distinguished.**—But a distinction must be kept in view between terms in a contract of subscription which amount to conditions precedent and those which merely bind the corporation to perform acts upon the performance of which the obligation on the part of the subscriber to become a shareholder is not made to depend.

R. R. Co. v. Brush, 43 Conn. 86. But in the last case the subscriptions were counted for the reason that the contract for payment in work, being parol, was not allowed to vary the apparently absolute subscription.

1 Ashtabula & New London R. R. Co. v. Smith, 15 O. St. 328; Taggart v. Western Md. R. R. Co., 24 Md. 563; Lowe v. Edgefield & K. R. R. Co., 1 Head. (Tenn.) 659.

2 Junction R. R. Co. v. Reeve, 15 Ind. 236; Galt's Exrs. v. Swain, 9 Gratt. (Va.) 633; Taggart v. Western Md. R. R. Co., 24 Md. 563; New Albany & Salem R. R. Co. v. McCormick, 10 Ind. 499; Pittsburg & Connellsville, R. R. Co. v. Stewart, 41 Pa. St. 54; Mansfield & New Lisbon R. R. Co. v. Smith, 15 O. St. 328.

3 Taggart v. Western Md. R. R. Co., 24 Md. 563.

4 Wood's Case, L. R. 15 Eq. 236.

For instance, where stipulations are embodied concerning the application of the money to be paid by the subscriber or of the corporation's capital stock which do not peculiarly affect one shareholder more than others, and all other stipulations affecting the internal management of the corporate body, where not expressly made so, are not conditions precedent.[1]

In subscriptions to the capital stock of railroad corporations are often found provisos that unless the company's road is located on a specified route, or a depot built at a certain point the party shall not be bound to make the stipulated payment. Such provisions are conditions precedent and due performance must be proven before the company can recover the amount of shares so stipulated for. And it has been held that though notes are given at the time by the party signing such conditional contract of such subscription, a failure of performance may be pleaded by the maker of the notes in a suit by the corporation in bar of recovery.[2]

§ **333. What conditions may be inserted.**—After incorporation the authorities are uniform in holding that parties may make the performance or compliance by the corporation with any legal and possible terms they choose a condition precedent to payment. But as to the effect of conditions in subscriptions made in order to raise the preliminary capital required by statute or the charter before beginning business, different rules have been established in different states. The weight of authority, however, is to the effect, that none but unconditional subscriptions should be accepted for the purpose. In New York it seems to be the settled rule

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1 McGinnis v. Kortkamp, 24 Mo. App. 381; McMillan v. Marysville, etc., R. R. Co., 15 B. Monr. 218.

2 Parker v. Humas, 19 Ind. 213; Taylor v. Fletcher, 15 Ind. 80.

that conditional subscriptions are to be rejected.[1] In Pennsylvania, the condition is void and the subscription is treated as absolute.[2] The views in the federal courts are somewhat conflicting, though the point seems not to have been directly passed upon.[3] The practical result of the decisions in both New York and Pennsylvania is that subscriptions taken before incorporation must be absolute. "Any other rule would lead to the procurement from the commonwealth of valuable charters without any absolute capital for their support, and thereby give rise to a system of speculation and fraud which would be intolerable."[4] To the same effect will be found the decisions in most, if not all, the other states, though an early case holds to the contrary.[5] While the right to insert conditions in contracts of subscription after incorporation is everywhere recognized the legality and enforceability of conditions must be determined by the policy of the particular state where the contract is made as affecting all contracts. What would be immoral and illegal or contrary to public policy in one state, might be quite otherwise elsewhere.[6]

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[1] Troy & Boston R. R. Co. v. Tibbits, 18 Barb. 297; In re Rochester, etc., R. R. Co., 50 Hun, 29.

[2] Caley v. Phil., etc., R. R. Co., 80 Pa. St. 363; Boyd v. Peach Bottom Ry. Co., 90 Id. 169; Bedford R. R. Co. v. Bowser, 48 Id. 29; Barrington v. Pittsburg & S. R. R. Co., 44 Id. 358; P. & S. R. R. Co. v. Biggar, 34 Md. 455; Same v. Woodnew, 3 Phil. 271.

[3] See Burke v. Smith, 16 Wall. 390; Putnam v. City of Albany, 4 Biss. 365, 383.

[4] Caley v. Phil., etc., Co. County R. R. Co., supra.

[5] Chamberlain v. P. & H. R. R. Co., 15 O. St. 225.

[6] The test of the legal effect of such contracts is the extent of the parties which must be determined by a consideration not only of the words of the particular clause but also the language of the whole contract as well as the nature of the act acquired and the subject matter to which it relates. Bucksport & B. R. R. Co. v. Inhab. etc., 67 Me. 295; Chamberlain v. P. & H. R. R. Co., 15 O. St. 225.

The familiar exception to the general rule that terms and stipulations intended by the parties to be incorporated in the contract but which were omitted through accident, fraud or mistake, may be orally proven, applies as well to subscriptions

It is a misnomer to speak of conditions subsequent in contracts of subscription, since the breach of the collateral undertaking does not operate as a rescission of the main contract. They are really covenants, not conditions.[1] A requirement that the whole or a specified part of the road shall be constructed on a specified route is not a condition but a collateral undertaking. An important reason for giving them such effect and construction, is that the payment of the subscription itself is necessary to carry out the requirement.[2]

§ 334. Undertakings to locate railroads, etc.—In most

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as to other contracts. Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Kennebec & Portland R. R. Co. v. Waters, 34 Me. 369; Cin. N. & Ft. W. R. Co. v. Pearce, 28 Ind. 502; Scarlett v. Academy of Music, 46 Md. 132; Dill. v. Wabash Val. R. Co., 21 Ill. 91; E. Tenn. & Va. R. R. Co. v. Gammon, 5 Sneed, 567; Corwith v. Culver, 69 Ill. 502; Jack v. Naber, 15 Ga. 450; Thornburgh v. Newcastle & D. R. Co., 14 Ind. 499; Gelpcke v. Blake, 15 Ia. 387; Johnson v. Pensacola & Ga. R. R. Co., 9 Fla. 299; Miss. O. & R. R. R. Co. v. Cross, 20 Ark. 443; Ridgefield & N. Y. R. R. Co. v. Busch, 43 Conn. 86; Phœnix Warehousing Co. v. Badger, 6 Hun, 293; Whitehall & P. R. Co. v. Myers, 16 Abb. Pr. (N. S.) 34. See Brewer's Fire Ins. Co. v. Burger, 10 Hun, 56; Eighmire v. Taylor, 98 N. Y. 288; Hendrix v. Academy of Music, 73 Ga. 437. Subsequent parol contracts on new considerations were upheld in Pittsburg & Connellsville R. Co v. Stewart, 41 Pa. St. 54; Tonica R. Co. v. Stein, 21 Ill. 96. See also Bucher v. Dillsburg etc., R. R. Co., 79 Pa. St. 306; Brewer's, etc., Ins. Co. v. Burger, 10 Hun, 56; Eighmie v. Taylor, 98 N. Y. 288.

[1] Lane v. Brainerd, 30 Conn. 565; H. & N. R. R. Co. v. Leovell, 16 B. Monr. 358.

[2] "It is a most extraordinary defense, for it presupposes that the company were to build their road without money and to deliver it a finished work to the stock subscribers who were then to pay their subscriptions." Miller v. P. & C. R. R. Co., 40 Pa. St. 237. See also on this point Swortwout v. Mich. A. R. Co., 24 Mich. 389; McMillan v. M. & L. R. R. Co., 15 B. Monr. 218; B. & B. R. R. Co. v. Inhab., etc., 67 Me. 295; N. Mo. R. R. Co. v. Winkler, 29 Mo. 318; Belfast & M. L. Ry. Co. v. Moore, 60 Me. 561; Chamberlain v. C. P. & H. R. Co., 15 O. St. 225. Other so-called conditions subsequent not allowed to defeat recovery on the subscriptions were that "the road goes within half a mile of Florence" P. & S. R. R. Co. v. Biggar, 34 Pa. St. 455; that commissioners should be appointed to see that other conditions are complied with. Shaffner v. Jeffries, 18 Mo. 512; that the money subscribed should be expended on a certain part of the road, Lane v. Brainerd, 30 Conn. 565; that a depot shall be established at a certain place. Paducah, etc., R. R. Co. v. Parks, 2 Pickle (Tenn.), 554; 8 S.W. Rep. 842; that bonds will be issued as a bonus to the stockholders. Morrow v. Nashville, etc., Co., 3 Pickle (Tenn.), 262; 10 S. W. 495.

states it is entirely legal to make a subscription for stock in a railroad or turnpike conditional upon a particular location of the route or of a depot; and yet in New York public policy is held to forbid such conditions and they are accordingly not enforceable.[1] Such conditions are upheld in other states.[2] The validity of ordinary conditions are generally upheld.[3] A condition that part or all of the subscriptions shall be expended on a particular part of a railroad is valid;[4] or a condition with reference to the amount of capital to be subscribed may be superadded to that which the law implies;[5] or upon that which the charter allows to suffice.[6]

The subscriber may reserve the right to approve the location of the route of a railroad before becoming subjected to payment;[7] or, except in New York, may make it a condition precedent to liability that it shall be located on a particular route.[8] Where the condition is

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[1] Butternuts, etc., O. Turnp. Co. v. North, 1 Hill, 518; Ft. Edward, etc., Co. v. Payne, 15 N. Y. 583; M. & B. Pl. R. Co. v. Snedicker, 18 Barb. 317.

[2] Ashtabula, etc., N. E. R. R. Co. v. Smith, 15 Ohio St. 328; New Albany & Salem R. R. Co. v. McCormick, 10 Ind. 499; McMillan v. Maysville & L. R. Co., 15 B. Monr. 218; Dayton, etc., R. Co. v. Hatch, 1 Disney, 84.

[3] Union Hotel v. Hersee, 79 N. Y. 454; Burrows v. Smith, 10 N. Y. 550; Morris Canal & Bkg. Co. v. Nathan, 2 Hall, 239.

[4] Milwaukee & Northern Ill. R. R. Co. v. Field, 12 Wis. 340; Hanover Junction & Sus. R. R. Co. v. Haldeman, 82 Pa. St. 36.

[5] Penobscot & Kenebec R. R. Co. v. Dunn, 39 Me. 587; Phil. & Westchester R. R. Co. v. Hickman, 28 Pa. St. 318; Union Hotel Co. v. Hersee, 79 N. Y. 454; Hanover Junc. & Sus. R. R. Co. v. Haldeman, supra.

[6] Ridgefield & N. Y. R. R. Co. v. Brush, 43 Conn. 86.

[7] Robert's Case, 3 De Gex & Sm. 205; aff'd 2 Mac. & G. 196; Spartanburgh, etc., R. R. Co. v. De Graffenseid, 12 Rich. L. 675; Mansfield etc., R. R. Co. v. Brown, 26 O. St. 224; Chamberlain v. Painesville, etc., R. R. Co., 15 O. St. 225; Des Moines, etc., R. R. Co. v. Graff, 27 Ia. 99; Mansfield, etc., R. R. Co. v. Stout, 26 O. St. 241; North., etc., R. R. Co. v. Winkler, 29 Mo. 318.

[8] Jewett v. Lawrenceburgh, etc., R. R. Co., 10 Ind. 529; Wear v. Jacksonville, etc., R. R. Co., 24 Ill. 595; Fisher v. Evansville, etc., R. R. Co., 7 Ind. 407; Evansville, etc., R. R. Co. v. Shearer, 10 Ind. 246; Conn. & Passumpsic R. R. Co. v. Baxter, 32 Vt. 805; Cumberland Valley R. R. Co. v. Baab, 9 Watts, 458; Mo. Pac. Ry. Co. v. Taggart, 84 Mo. 264; Taggart v. Western Md. R. R. Co., 42 Md. 563; Racine County B'k v. Ayers, 12 Wis. 512. Often the advantages of

illegal or impossible and yet constitutes the main inducement to the subscription, the latter is a nullity; and prior to the performance of an *ultra vires* condition the subscription is not enforceable.[1]

§ **335. Construction of conditional subscription.**—No definite general rule can be laid down for the determination of the question whether the terms of contracts of this nature amount to conditions precedent, or of what constitutes a due performance of the conditions. The decision in each case must depend in a great degree, upon its own circumstances, keeping the intention of the parties constantly in view so far as such intention can be gathered from the language employed.[2]

§ **336. Performance and avoidance of conditions.**—When the terms to be complied with on the part of the corporation are decided to be conditions precedent and due performance is alleged, it is sometimes difficult to determine what acts amount to due performance. Generally speaking, a substantial performance satisfies the terms of the contract.[3]

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a particular location are alone sufficient inducement for promises of money and property. These may be enforced after performance of the condition by the corporation. Stowell v. Stowell, 45 Mich. 364; First Nat. B'k v. Hendrie, 49 Ia. 402; Berryman v. Cin. S. Ry. Co., 14 Bush (Ky.) 755.

1 Pellatt's Case, L. R. 2 Ch. 527.

2 See Meyer v. Blair (N. Y.), 4 Ry. & Corp. L. J. 159; Hahm v. Johnson, Cowper, 343; R. R. Co. v. Eastman, 34 N. H 124; Graff v. R. R. Co., 31 Pa. St. 489; Miller v. R. R. Co., 87 Pa. St. 95; Melvin v. Ins. Co., 80 Ill. 446.

3 People v. Holden, 82 Ill. 93; Springfield St. Ry. Co. v. Sleeper, 121 Mass. 29; O'Neal v. King, 3 Jones' Law (N. C.), 517. See also, Virginia, etc., R. R. Co. v. County Commrs., 8 Nev. 68; See Chamberlain v. Painesville & H. R. R. Co., 15 O. St. 225; Johnson v. Ga. Midland & Gulf R. R. Co., 81 Ga. 725; 8 S. E. 531; R. R. Co. v. Parks, 2 Pickle (Tenn.), 554; 8 S. W. Rep. 842; Henderson v. Thompson, 52 Ga. 149; Meyer v. Blair, 109 N. Y. 600; 4 Ry. & Corp. L. J. 159. Where the condition is that a given sum shall be raised by subscription it means valid and binding subscriptions, App. of Hahn, 7 Atl. Rep. 482 (Pa.); App. of Cornell, 6 Atl. Rep. 114; Pa. 153, 258. It is generally unimportant to the subscriber who performs the condition. Thus it was held that a condition that

On the other hand a mere technical compliance with the letter of the contract will not be sufficient where it does not satisfy the intention of the parties according to a fair construction of their language in the sense in which it is used.[1] If, after the condition has been

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a blast furnace should be constructed was complied with by its construction by a lessee. App. of Cornell, 6 Atl. Rep. 258. But a condition that a road shall be completed by a company named is not complied with by its completion by a consolidated company so as to enable the latter to enforce it. Toledo, etc., R. R. v. Hinsdale, 45 O. St. 556; 15 N. E. Rep. 665. A condition in the vote of a city granting aid to a railroad, that the money shall not be payable unless the road shall be completed for use within a specified time, is complied with when the road is built, so as to be in as reasonable fit condition and as safe and convenient for the public use as new roads usually are in similar localities. Manchester & K. R. R. v. City of Keen, 62 N. H. 81; holding also that an amendment by a clerk of the record by which the time within which a road is required to be completed is shortened, will not be allowed to prejudice the rights of the company with respect to the aid previously adopted by popular vote.

Under Comp. Laws, Kan. 1885, c. 84, sec. 68, relating to municipal aid to railroads, and providing that townships shall issue no more than $15,000 and 5 per cent on its assessed value for such purpose, a subscription to the amount limited, duly made and accepted by the company, is a contract binding on the township, and, the conditions being performed, the company is entitled to the township-bonds to the exclusion of another road, to whose stock the town has afterwards subscribed, though the latter perform its conditions first. Chicago K. & W. Ry. Co. v. Freeman (Kan.), 16 P. 828.

The stockholders of a national bank proposed to surrender its charter and organize as a state bank in another county, and to erect a certain building on a designated lot, provided the citizens of that county would subscribe $30,000 to its capital stock. The defendant and others subscribed $35,000 by a writing which recited the proposal, and that "we * * * do hereby subscribe the amounts opposite our names to the capital stock of said proposed bank, under the foregoing proposition, and in the following conditions." In a suit by the bank organized under the state law, the petition stated the terms of the subscription, and that the bank had duly performed all the conditions on its part to be performed. It was held that a cause of action was stated. Security State Bank v. Raine (Neb.), 48 N. W. 262.

[1] In a note given to a company about to begin the construction of a railroad appeared the following condition: "If said road is not completed by the twenty-fifth day of December, 1866, the cars running to Rushville, this note is null and void."

It appeared from the evidence that on the date named cars were run over a temporary track laid down for the purpose, and that it was fully four months afterwards before cars were making regular trips to Rushville. It was held that within the meaning of the contract "the road was not completed and that the cars were not running thereon to Rushville by the twenty-fifth day of December, 1866, and that the note in suit was therefore by its terms null and void." Freeman-

complied with and payment made, the plans are changed by the company so as to amount to non-performance, the money so paid may be recovered back.[1]

§ **337. Colorable subscriptions binding.**—Where both parties have entered into the contract with an understanding that it shall be colorable only with the object of inducing others to subscribe, and others have been induced by it to do so, both the fraudulent and subsequent subscriptions are binding. The parties to the fraudulent subscriptions may be compelled by subsequent subscribers to make good the *status* they have represented by their conduct to exist; and because of this power on their part, subscribers subsequent to them are not allowed to set up the fraud to avoid their own subscriptions.[2]

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tal v. Matlock, 67 Ind. 99. A promise to pay money upon the completion of a railroad described in the contract can only be enforced by the promisee upon proof that the railroad named has been completed, and it will not be sufficient to entitle the promisee to a recovery to prove that a railroad has been built, for it must be shown that the railroad described has been built. Low v. Studebaker, 110 Ind. 57; 10 N. E. 301.

[1] Jewett v. Lawrenceburgh & W. M. R. R. Co., 10 Ind. 539.

[2] Conn. etc., R. R. Co. v. Bailey, 24 Vt. 465, 476; Jewett Valley Ry. Co., 34 O. St. 60. See also, Downie v. White, 12 Wis. 176; Weatherbee v. Baker, 35 N. J. Eq. 501; Centre & K. Turnp. Road Co. v. McConahy, 16 Searg. & R. 140; Phœnix Warehousing Co. v. Badger, 6 Hun, 293; aff'd 67 N. Y. 294; Peychaud v. Hood, 23 La. Ann. 732; Cleveland Iron Co. v. Ennor, 116 Ill. 55; Robinson v. Pittsburg, etc., R. Co., 32 Pa. St. 334; Graff v. Pittsburg & S. R. Co., 31 Pa. St. 489; Mann v. Cooke, 20 Conn. 178; Conn. & P. R. Co. v. Bailey, 24 Vt. 465; Davidson's Case, 3 De G. & Sm. 21; Bridger's Case, L. R. 9 Eq. Cas. 74; New Albany & S. R. Co. v. Slaughter, 10 Ind. 218; Blodgett v. Morrill, 29 Vt. 509; Minor v. Mech. B'k, 1 Pet. 46; Bates v. Lewis, 3 O. St. 459; Litchfield B'k v. Church, 29 Conn. 137; Mangles v. Grand Collier Dock Co., 10 Sim. 519; Chouteau Ins. Co. v. Floyd, 74 Mo. 286. On like principle the following promises on the part of the corporation have been held unavailable as defences; that the subscription shall be in fact a pledge of stock by the corporation to the subscriber or that it may be surrendered. Melvin v. Lainor Ins. Co., 80 Ill. 446; White Mts. R. Co. v. Eastman, 34 N. H. 124; Gill v. Bates, 72 Mo. 424; that the subscriber should be entitled to keep his stock on payment of less than its par value; Custer v. Titusville Gas & Water Co., 63 Pa. 381; Un. Mut. L. Ins. Co. v. Frearstone Mfg. Co., 97 Ill. 537; for other similar executory contracts held to be invalid as defenses, see Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Crossman v.

The rule was applied to a secret agreement between an agent of a company and a subscriber that the amount of stock contracted for should be reduced after the entire subscription had been used to induce others to subscribe.[1]

§ **338. Fictitious subscriptions.**—But there is a distinction between subscriptions fraudulently made to induce others and fictitious subscriptions. If by the latter, persons are induced to subscribe, their subscriptions are voidable, for there is a toal absence of the reason for holding them which exists in the former case. And it has been held that they are not bound in cases of colorable subscriptions if the previous subscriptions based upon the secret agreement were made by persons unable by reason of insolvency or other cause to carry out their agreements. But this cannot be admitted as a principle. It might be allowed to operate in exceptional cases, but it would be difficult to avoid carrying it too far in practice. If it applies to a case where there has been a fraudulent secret agreement not binding or admissible in evidence, there is no reason

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Penrose Ferry Bridge Co., 26 Pa. 69; New Albany & S. R. Co. v. Fields, 10 Ind. 187; East Tenn. & Va. R. Co. v. Gammon, 5 Sneed (Tenn.), 567; Saffold v. Barnes, 39 Miss. 399; Payson v. Withers, 5 Biss. 269; Goff v. Hawkeye Pump & W. M. Co., 62 Ia. 691; Corwith v. Culver, 69 Ill. 502. Where the subscription was made for the sole purpose of enabling the corporation to obtain a certificate of organization under an agreement with the other subscribers that the subscriber should not be liable on the stock but should hold it as a trustee, he was held liable on his subscription as between himself and the creditors of the corporation. But it was held that he was not liable to an assessment on his stock in a suit by other subscribers brought for the purpose of winding up the concern and paying its debts, especially where their subscriptions are not fully paid. Winstow v. Brooks (Ill.), 4 L. R. An. 507. See Wilson v. Rivett, 119 Ill. 379.

[1] White Mts. R. R. Co. v. Eastman, 34 N. H. 124. See Whitehall, etc., R. R. Co. v. Myers, 16 Abb. Pr. 34; Buffalo, etc., R. R. Co. v. Dudley, 14 N. Y. 336; Jewett v. Valley R. R. Co., 34 O. St. 601.

for withholding it in any case where a preceding subscriber can be shown to have been insolvent at the time of subscribing.

The application of such a rule in practice would render voidable a large proportion of stock subscriptions.

§ 339. **When subscriptions become payable.**—Though, as we have shown, a subscription is binding unless revoked before acceptance from the time it is made, the subscriber cannot be called upon to contribute his share of the capital until the corporation has been actually formed. There, is no completed contract; and, therefore, no matured liability until the company has been incorporated and invested by law with authority to carry on business in a corporate capacity.[1]

§ 340. **Statutory modifications of the common law.**—The common law requirement that the whole capital stock shall be subscribed before the corporation shall have the right to make assessments, is in several states modified by statutes.[2] The general current of authorities maintains the rule that compliance with such provision is a condition precedent to the right to make calls or assessments, thus harmonizing with the decisions made with respect to the common law rule that subscriptions for the entire capital is a condition precedent. "It would appear unjust as well as a violation of the con-

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1 Peoria, etc., R. R. Co. v. Preston, 35 Ia. 116; New Haven Cent. R. R. Co. v. Johnson, 30 N. H. 390; Contocook Valley, R. R. Co. v. Barker, 32 Id. 363; Continental T. Co. v. Valentine, 10 Pick. 142; Mass. Iron Co. v. Hooper, 7 Cush. 183; Hamilton, etc., P. R. Co. v. Rice, 7 Barb. 157; Lewey's Island R. R. Co. v. Bolton, 48 Me. 451; Hughes v. Antietam Mfg. Co., 34 Md. 316. See North Safford Steel, etc., Co. v. Ward, L. R. 3 Exch. 172, supra.

2 In Wisconsin it is provided that until at least one half of its capital stock has been subscribed, and at least 20 per cent thereof paid in, "no such corporation shall transact business with any other than its members. It was held that until this statute was complied with, a corporation has no right to make an assessment. Anvil Min. Co. v. Sherman, 74 Wis. 226; 42 N. W. 222.

tract of subscription to assess the stock of one subscriber for the expenses of the general business of the corporation before it is authorized to do such business, and capable of making fair and equal assessments upon all of its capital stock; and neither condition is complied with until all of its capital stock has been subscribed."[1]

But such condition being as much for the protection of subscribers themselves as of the business community, and being a provision of law entering into and forming part of the contract of subscription, it may be waived and the liability made absolute by any act showing a contrary intention on the part of the subscriber, such as participating in the organization before the required amount has been raised, voting to begin the business for which the corporation is being organized, and the like.[2]

§ 341. **The rule in Oregon.**—Under the general incorporation laws of Oregon and the construction given to them by the courts, an exceptional rule prevails in that state, and it is there held that whenever a corporation is so organized as to be capable of prosecuting its business, it has power, through its board of directors, to

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[1] ORTON, J., in Anvil Min. Co. v. Sherman, 74 Wis. 225; 42 N. W. 226. See also, Salem Mill Dam v. Ropes, 6 Pick. 23; Stoneham Br. R. Co. v. Gould, 2 Gray, 277; Bridge v. Chapin, 6 Cush. 50; Eaton v. B'k, 144 Mass. 260; Warwick, R. R Co. v. Cady, 11 R. I. 131; Haskell v. Worthington, 19 Am. & Eng. Cor. Cas. 275; Banty v. Buckles, 68 Ind. 49; Allman v. Havana, R. & E. R. Co., 88 Ill. 521; Peoria & R. I. R. Co. v. Preston, 35 Ia. 115; Rockland, etc., Co. v. Sewall, 78 Me. 167, 198. The following are authorities under statutes modifying the common law requirement, and are to the effect that when the statute fixes a less amount than the whole as that which must be obtained it constitutes a condition precedent to the making of calls or beginning of business; Jewett v. Valley R. Co., 34 O. St. 601; Schenectady & S. P. R. Co. v. Thatcher, 11 N. Y. 102; Boston B. & G. R. Co. v. Wellington, 113 Mass. 79; Hanover Junc. & S. R. Co. v. Haldeman, 82 Pa. St. 36; New Haven & D. R. Co. v. Chapman, 38 Conn. 65.

[2] Marshall Foundry Co. v. Killian, 99 N. Car. 501; Belton Compress Co. v. Saunders, 70 Tex. 609. See also, Naugatuck W. Co. v. Nichols, 58 Conn. 403; 20 A. 315.

levy assessments ; and that subscriptions to the entire amount of stock is not a condition precedent to general corporate existence unless expressly made so in the articles of incorporation.[1]

§ **342. Construction of special provisions.**—Where the charter or articles do not definitely fix the entire amount of the capital stock, but only provide that it shall not be less than a certain sum nor more than a certain other sum, and contain no other provision or direction on the subject, it will be presumed that the intention is that the stockholders or directors shall fix the amount by vote. In such case no assessments can be levied until the amount is determined,[2] nor after it is determined, until the whole amount has been subscribed.[3]

In any case, however, where a corporation is authorized by law or its articles to begin the prosecution of its main enterprise before the amount of its capital has been fixed at a certain sum by vote of stockholders or otherwise, such authority also empowers it to make calls upon its shareholders to contribute the requisite capital for that purpose.[4]

The same exception governs where a corporation is authorized by its charter or articles not in conflict with general law to enter into engagements and incur expenses before the whole amount of its capital has been

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[1] Oregon Cent. R. R. Co. v. Scroggin, 3 Or. 161; Willamette Freighting Co. v. Stamus, 4 Id. 261. A proviso in sec. 6 of the Oregon act in relation to private corporations, makes it lawful for such corporations to proceed to elect directors after one-half of the capital stock has been subscribed. Missc. Laws Ch. 7; Astoria & S. C. R. Co. v. Hill (Or.), 25 P. 379.

[2] Somerset R. R. Co. v. Clarke, 61 Me. 384; Somerset, etc., R. R. Co. v. Cushing, 45 Me. 524. See White Mts. R. R. Co. v. Eastman, 34 N. H. 124.

[3] Reed v. Memphis Gayoso Gas. Co., 9 Heisk. Tenn. 545, 551; Littleton Mfg. Co. v. Parker, 14 N. H. 543; Cabot, etc., Bridge Co. v. Chapin, 6 Cush. 50; Contocook Valley R. R. Co. v. Barker, 32 N. H. 363.

[4] Penobscot, etc., R. R. Co. v. Bartlett, 12 Gray, 244; Nichols v. Burlington, etc., R. Co., 4 Greene (Id.) 42; Bucksport, etc., R. R. Co. v. Buck, 65 Me. 536.

subscribed. In such cases the shareholders will be liable to pay calls made for that purpose but not for any other purpose.[1]

§ **343. Extent of liability to pay assessments.**—So long as the statute and articles are pursued there is no doubt of the right of a corporation to make calls and levy assessments to the full amount of the subscriptions whatever the purpose for which the subscribed capital is needed, provided such purpose be authorized by the shareholders. But whether assessments can be collected to pay indebtedness of the corporation beyond the subscribed capital stock, depends upon the statutory provisions of the particular state where the question arises. It is clear that at common law, there was no liability incurred by the contract of subscription, beyond the par value of the stock subscribed; nor did the common law provide any remedy by forfeiture against the delinquent shareholder. To authorize a sale of the stock, even for that purpose, statutory authority is necessary.[2] It is well settled by the great preponderance of authority both in this country and in England, that a stockholder cannot be assessed above the par value of his stock. The mere act of creating a corporation implies a limited liability.[3] The liability of the stockholder being purely *ex contractu* extends no further than the undertaking to contribute capital con-

[1] Central Turnp. Co. v. Valentine, 10 Pick. 142; Salem Mill Dam Co. v. Ropes, 6 Pick. 23, 43.

[2] But see Santa Cruz R. R. Co. v. Spreckles, 65 Cal. 193; Sullivan v. Triunfo, Min. Co., 39 Cal. 465, holding that assessments could be made and collected beyond the par value of the stock. But in that state it may be considered as still an interesting, if not a leading question. In the latest case first cited above the decision was by a bare majority, and seems to be overborne by the able dissenting opinion of THORNTON, while MCKINSTRY, J., concurred with the majority on another ground expressing no opinion on the present question.

[3] Oliver v. Liverpool, etc., Ins. Co., 100 Mass. 531, 539.

tained in his subscription.[1] It is held in California[2] that the directors may assess stockholders beyond the par value of the stock to pay indebtedness of the corporation. But it would seem, according to often recognized rules of construction, that the legislature having expressly defined the extent and nature of the personal liability of stockholders and directors in such case, and provided ample and specific means for its enforcement, that it is not only unnecessary but contrary to the maxim *expressio unis alterior excludit* to superadd by construction power to make further exactions, and confer a power upon corporate managers by implication from the language of statutes intended to place limitations on the exercise of powers by them. The power, if possessed, is much more likely to be perverted and employed collusively, to confiscate the property of the shareholder, from motives of self-interest than to be exercised fairly in the interest of creditors.

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[1] Great Falls, etc., R. R. Co. v. Copp, 38 N. H. 124; State v. Morristown Fire Ass'n, 3 Zab. 195; Morley v. Thayer, 3 Fed. Rep. 737; Chase v. Lord, 77 N. Y. 1; Slee v. Bloom, 19 Johns. 453, 473; Show v. Baylan, 16 Ind. 384; Coffin v. Rich, 45 Mass. 511; Gray v. Coffin, 63 Mass. 193, 199; French v. Teschemacher, 24 Cal. 518, 540; Inhab. of Norton v. Hodges, 100 Mass. 241; Oliver v. Liv., etc., Ins. Co., 100 Mass. 531, 539. Personal liability and membership in a corporate body are inconsistent ideas. Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 576; New England B'k v. Stockholders, etc., 6 R. I. 188; Walker v. Lewis, 49 Tex. 123; Green v. Beckman, 59 Cal. 545; Jones v. Jaman, 34 Ark. 323; Windham Prov. Inst. v. Sprague, 43 Vt. 502; Woods v. Hicks, 7 Lea. (Tenn.), 40; Terry v. Little, 101 U. S. 216; Smith v. Huckabee, 53 Ala. 191; Spense v. Iowa Valley Constr. Co., 36 Ia. 407; Salt Lake City Nat. B'k v. Hendricksey, 40 N. J. L. Rep. 52; Van Sandon v. Moore, 1 Russ. Ch. 392, 408; Atwood v. R. I. Agr. B'k, 1 R. I. 376. But where stockholders have voluntarily assessed themselves and paid the assessments, a debt is not thereby created against the corporation for which an action will lie. Bidwell v. Pittsburg, etc., R. R. Co., 114 Pa. 535; 6 Atl. Rep. 729; Leavitt v. Oxford, etc., Co., 3 Utah, 265; 1 P. 356. The law is the same in England and in the "Companies Act" Cavaugh's Law of Money Securities, 2d. Ed. 494; Lion, etc., Ins. Co. v. Tucker, L. R. 12 Q. B. D. 176; In re Norwich Ins. Soc., L. R. 13 Ch. D. 693; In re City, etc., B'k, L. R. 4 App. Cas. 337 to 632; City, etc., B'k v. Houldsworth, L. R. 5 App. Cas. 317.

[2] See R. R. Ço. v. Spreckles, 65 Cal. 193; Sullivan v. Min. Co., 39 Cal. 465.

§ **344. Time and mode of payment.**—Unless it be so expressed in the contract of subscription, part payment at the time of subscribing is not necessary to its validity. And even where by its terms or by the terms of the articles or general law, it is required, a party who does not make the part payment at the time of subscribing whose payment is afterwards accepted by the corporation, can claim his rights as a stockholder.

Although it may have been agreed between the stockholders, that payment of the stock should not be enforced but should be paid by the dividends, if valid, and not contrary to public policy, still the contract cannot be set up to defeat the collection of a note given by a stockholder thereafter, for the amount of his stock. The giving of such note amounts to a rescission of any such agreement.[1]

§ **345. In what subscriptions to be paid.**—In the absence of a provision in the by-laws or in the contract of subscription to the contrary, subscriptions like other promises for a sum certain are payable in cash only. And a payment by a check on a solvent bank by a solvent and responsible drawer does not satisfy the terms of a statute requiring cash payment.[2] But unless expressly required by statute to be paid in cash a provision in the constating instruments allowing payments otherwise will be valid.

And where there is no express provision how or in what stock subscriptions shall be paid, the directors having general power to prescribe the manner of payment may direct the character of payment to be accepted and may accept labor materials or promissory

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[1] McDowell v. Chicago Steel Works, 124 Ill. 491. See Whittaker v. Grummond, 68 Mich. 249; N. O. & G. R. Co. v. Frank, 39 La. Ann. 707.

[2] People v. Stockton, etc., R. R. Co., 45 Cal. 306.

notes instead of cash.[1] But, under the New York statute allowing certain companies to purchase property necessary for their business and to issue stock to the amount in value thereof in payment, it is held that such corporations have no power to issue their stock in payment for purchased property at less than par value.[2]

Under such a subscription a refusal to perform the labor or deliver the materials renders the subscriber liable for the amount subscribed in money.[3]

Collateral agreements between a corporation and particular subscribers for the payment of subscriptions otherwise than in cash, unless such privilege is accorded alike to all, are fraudulent and void as to the other subscribers, and in all cases as to creditors who have given credit without notice of such special arrangements.[4]

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[1] Clark v. Farmington, 11 Wis. 306; Eppes v. Miss. & G. & T. R. R. Co., 35 Ala. 33.

[2] Reversing 5 N. Y. S. 124. Gamble v. Queens County Water Co. (N. Y.), 25 N. E. 201. An original issue on credit of stock in a corporation at less than half its par value is in violation of Const. Ala., art 14, sec. 6, which prohibits increase of stock except for money, labor done, or money or property actually received. Perry v. Tuscaloosa Cotton-Seed Oil Mill Co. (Ala.), 9 So. 217 (April 30, 1891).

[3] Haywood, etc., R. R. Co. v. Bryan, 6 Jones (N. C.), 82. It was held under a statute requiring a payment of five dollars on each share subscribed and providing that without such payment no subscription should be valid, that the giving of a note for the amount was not a compliance with the statute. Boyd v. Peach Bottom R. R. Co., 90 Pa. St. 169. But in another case under a statute providing that upon each share of stock subscribed the subscriber should pay to the commissioners taking the same five dollars, and on non-payment of said installment, the subscription should be void, it was held that although the subscriber who had given his note for the amount, could not have been compelled to pay the $5 per share by force of the subscription, yet if he and the other subscribers chose to waive the provisions thus made for their benefit respectively and agreed that upon his giving bond for the amount, it should be taken as cash and be admitted into the company, and he does so, he could be compelled to pay the same. Home Stock Ins. Co. v. Sherwood, 72 Mo. 461, 464; see also Rae v. Russell, 12 Ired. 224; Highland Turnp. Co. v. McKean, 11 Johns. 100; Hibernia Turnp. Co. v. Henderson, 8 Searg. & R. 219; Wilmarth v. Crawford, 10 Wend. 341.

[4] Noble v. Callender, 20 O. St. 199; Henry v. Vermilion, etc., R. R. Co., 17 O. St. 187. Where subscribers to the capital stock of a company, upon payment

§ **346. Stockholder as plaintiff against corporation.**— Except as witness, juror, etc., so far as his dealings may affect third creditors and other shareholders with respect to his interest in the corporation, a stockholder holds as independent a relation to the corporation as if such interest did not exist.

He may contract with the corporation; and with respect to his contracts with it, he owes no greater duty than third parties. Consequently, he may purchase claims against the corporation[2] and obtain security for his claims to the exclusion of the other creditors.[3] While at law he cannot sue the corporation on account of *inter se* rights,[4] yet outside of these, his relation constitutes no impediment either at law or in equity.[5] He has no authority or power as an agent by virtue of his interest.[6]

But at common law, his interest was considered such as to disqualify him from testifying as a witness

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of one-third of the par value, cause to be issued to themselves shares of fully paid stock, and at the same meeting issue a certain number of shares to certain persons for services alleged to have been rendered by them to the company, without any statement of the amount due for such services, the court will not enforce the issue of such shares, the contract being tainted with fraud. State v. Timken, 48 N. J. L. 87; 2 A. 738. Infra, 541, et seq.

[1] Gordon v. Preston, 1 Watts, 385; Hartford & N. H. R. R. Co. v. Kennedy, 12 Conn. 499, 509; Cent. R. R. Co. v. Claghorn, 1 Speer's Eq. (S. C.) 545, 562.

[2] Stockholders owing money upon their stock subscriptions have the right to buy and pay for the company's bonds, and either hold them or pass them upon the market. Bergen v. Porpoise Fishing Co., 42 N. J. 397; 8 A. 523.

[3] Ely v. Sprague, 1 Clark's Ch. (N. Y.), 351; Longley v. Stage Line Co., 23 Me. 39; American B'k v. Baker, 4 Met. (Mass.) 164, 176; Reichwald v. Commercial Hotel Co., 106 Ill. 439.

[4] Infra, Ch. XXII.

[5] Culbertson v. Wabash Nav. Co., 4 McLean, 544; Ex parte Booker, 18 Ark. 338; Bidwell v. Pittsburgh, etc., Co., 114 Pa. St. 535; 6 A. 729; Gifford v. New Jersey, etc., Co., 2 Stock. Ch. 171; Rogers v. Danby Univ. Soc., 19 Vt. 187; Waring v. Cahawba Co., 2 Hay (S. C.), 109; Pierce v. Partridge, 44 Mass. 44; Sanborn v. Lefferts, 58 N. Y. 179; Barnstead v. Empire Min. Co., 5 Cal. 299; Wasau & V. Co. v. Plummer, 35 Wis. 274; Dunstan v. Imperial, etc., Co., 3 B. & Ad. 125; Samuel v. Holladay, 1 Woolw. 400, 418.

[6] Morelock v. Westminster Water Co. (Md.), 4 A. 404.

for the corporation.[1] A transfer will qualify him, although the transfer has not been registered.[3] A stockholder is disqualified from serving as a juror,[4] or judge, where the corporation is a party.[5] Being related to a stockholder does not disqualify a judge[2] though it seems that it does a juror.[7]

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[1] Porter v. B'k of Rutland, 19 Vt. 410; McAuley v. The York, etc., 6 Cal. 80; Pierce v. Kearney, 5 Hill, 82; Mokelumne Hill, etc., Co. v. Woodbury, 14 Cal. 265; Mitchell v. Beckman, 64 Cal. 117; Compare Church v. Sterling, 16 Conn. 388; Simons v. Vulcan, etc., Co., 61 Pa. St. 202; Washington B'k v. Palmer, 2 Sandf. Sup. Ct. 686; New York, etc., R. R. Co. v. Cook, Id. 722.

[2] Union B'k v. Owen, 4 Humph. (Tenn.) 338; Ill. Ins. Co. v. Marseilles Mfg. Co., 6 Ill. 236; Bell v. Hull, 6 M. & W. 699.

[3] Del., etc., R. R. Co. v. Irick, 23 N. J. L. 321; Bank of Utica v. Smalley, 2 Cow. 770; Gilbert v. Manchester Iron Mfg. Co., 11 Wend. 627; State v. Catskill B'k, 18 Wend. 466.

[4] Williams v. Smith, 6 Cow. 166; Flesson v. Savage S. M. Co., 3 Nev. 157; Georgia R. R. Co. v. Hart, 60 Ala. 550; Silver v. Ely, 3 Watts & S. (Pa.) 420; Page v. Contoocook Val. R. R. Co., 21 N. H. 438; Peninsular R. R. Co. v. Howard, 20 Mich. 18.

[5] Dinns v. Prop. of Grand Junction Canal, 3 H. L. Cas. 759. See also Cooley on Const. Limit., Secs. 410, 411; Washington Ins. Co. v. Price, 1 Hopk. Ch. (N. Y.) 1; Peninsular Ry. Co. v. Howard, 20 Mich. 18; Stuart v. Mechanics' & Farmers' B'k, 19 Johns. 496, 501.

[6] Searsburgh L. Co. v. Cutter, 6 Vt. 315.

[7] Georgia R. R. Co. v. Hart, 60 Ala. 550.

CHAPTER XIV.

CONTRACTS OF MEMBERSHIP IN OTHER THAN CAPITAL STOCK CORPORATIONS.

§ 347. **General features of contract.**—In other than capital stock corporations the terms of the contract are evidenced by the charter or articles, the constitution adopted by the incorporators and all the by-laws in force at the time the constitution is signed by the candidate for membership. In most incorporated benevolent and friendly societies such signature in connection with a previous election or acceptance of his offer to

become such completes the contract of membership, and subjects the party to the performance of the duties therein imposed.

Often, the objects of the association are co-operative and mutually beneficial in a pecuniary sense; and in all such cases there is, in addition to the usual obligations, that of making contributions from time to time, with a condition that upon failure to so contribute the contract of membership shall cease. Sometimes the pecuniary contract is entirely independent of the contract of membership, and is governed, enforced and terminated by the same principles as other contracts of a similar nature without affecting the party's standing as a member. But usually the two contracts are interdependent, so that the collateral contract for the payment of money cannot be enforced by either party unless the promisee is a member at its maturity.

§ **348. Membership in voluntary associations.**—Whether a non-capital stock association be incorporated or not is unimportant as regards the rights and duties of members to each other. These are determined by the articles of association and by-laws. In both and with like effect each member pledges himself "to obey the laws as a condition of his membership, by an express undertaking in signing the constitution, and his promise to support the constitution and by-laws as a brotherly member. Nor is this pledge executed under the by-laws until he shall have answered on his word of truth that he is acquainted with the constitution and by-laws. The association having the right to make the by-laws for the well-being of the society and the proper regulation of its affairs, the regulation being a reasonable and proper one, contributing to the value of the membership, and the good of the association, and the member having accepted the by-laws in express

terms in his entry into membership, the by-laws constitute a part of the terms of the contract."[1]

§ 349. Effect of becoming incorporated.—It is only in the legal *status* toward third parties that differences exist between voluntary and incorporated religious, social, benevolent and mutual benefit societies. With respect to this *status* or relation the authorities are not harmonious. While in many cases the members of voluntary associations have been held to the duties and liabilities of partners, they have in others, and under different circumstances, been held to occupy other relations and to be exempt from personal liability in the absence of an implied agency authorizing the particular contract upon which the suit was brought.[2] Under the liberal provisions of general incorporation laws, a very large proportion of such associations, even those that are strictly social and benevolent, as clubs and churches, have, in this country, incorporated. By doing so the members relieve themselves from liability as partners, though they are frequently made personally liable by statute for the corporate indebtedness.

Mutual benefit societies, though generally incorporated under the statutes authorizing the formation of

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[1] St. Mary's Benev. Soc. v. Burford's Admin., 70 Pa. St. 321.

[2] "The language of many authorities (particularly those where the peculiar rules applicable to voluntary associations do not seem to have been brought to the attention of the court) proceeds upon the idea that every organization must be either a corporation or a partnership. Many of the cases in the books have been decided upon this principle: Is this society a corporation? No. Then it must be a partnership. But this is not the only alternative. There may be a joint or a common tenancy in property—there may be a mutual or reciprocal agency in transactions for a specified purpose—and there may be a well-defined organization of the owners of such property, or the actors in such transactions, or both—an organization even having articles (like a partnership), or having a constitution and by-laws (like the charter and by-laws of a corporation), yet the organization may be in the eye of the law neither a partnership nor a corporation." Ebbinghausen v. Worth Club, 4 Abb. N. C. 300, n. This subject fully considered infra, Ch. XXVI.

social, religious and benevolent societies, are not regarded as falling within either of those classes. In order that they may derive corporate existence and power under such statutes it is essential that they have no capital stock and be not organized for profit.[1]

§ **350. Business features in all societies.**—No organization can be held together and conducted, without financial resources of some kind. Even a Sabbath school composed mainly of children must have its revenues. Hence, the making of contributions is nearly always an *incident*, though not generally a *condition*, of membership.

The non-payment of dues is never a cause of forfeiture or expulsion, unless so provided in the articles or by-laws enacted in pursuance of statutory authority or special contract.

§ **351. Scope of the subject.**—Besides capital stock corporations, there may be incorporated in most of the states innumerable forms of aggregated humanity from the purely charitable kindergarten school to the stock board ; and the means of obtaining and losing membership in these are also numerous and varied. In a given case, the peculiar structure of the organization, the objects, the articles, constitution, by-laws, rules and regulations, and special contracts, if any, must be examined. Nothing less than an encyclopædia would adequately develop and expound the legal inquiries thus opened up. Only some of the more important bodies, membership in which involves considerable pecuniary interest, will be treated in this place.

§ **352. Mutual benefit contracts.**—A mutual benefit

[1] Infra, § 959.

certificate is in legal effect a contract of mutual insurance,[1] and is governed generally by the same laws. Such contract is of a dual character. It contains:—1st. In connection with the constitution, by-laws and charter, the contract of membership. 2nd. The contract of indemnity or for benefits or both, and to pay assessment.[2]

In the absence of statutory restrictions, minors are not ineligible to membership in mutual benefit societies. The objection that an infant can avoid his contract is not important, as adult members may do the like without incurring any liability. Nor is the objection important that minors could not act as trustees, because of their immaturity of judgment. The same objection would lie against many adult members, yet their lack of intelligence or business experience would be no reason for excluding them from membership.[3]

Such contracts are made by two classes of associations: first, those organized for that purpose solely; second, those organized for fraternal or social purposes which annex the mutual benefit and indemnity feature as an incident.

The latter class usually have a secret organization and ritual, have mystic signs and pass-words. There

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[1] State v. Nichols (Ia.), 41 N. W. 4 ; Rockland v. Canton, Mass., etc., Soc. (Ill.), 21 N. E. 794; Endowment & Ben. Ass'n v. State, 35 Kan. 253; 10 P. 372; State v. Farmers' & Mech., etc., Ass'n, 18 Neb. 276; Stamm v. Benefit Ass'n, 65 Mich. 317; State v. Merchants' Exchange, etc., 72 Mo. 146; Black v. Val., etc., Assn., 52 Ark. 340; 12 S. W. 477; Bolton v. Bolton, 73 Me. 299; Supreme Commandery, etc., v. Ainsworth, 71 Ala. 443; Folmer's Appeal, 87 Pa. St. 133; State v. Bankers, etc., 23 Kan. 499; Miner v. Mich. Mut. B'k Ass'n, 63 Mich. 338; 6 West. Rep. 117; 29 N. W. Rep. 852.

[2] As a mutual insurance contract, it is defined as "any contract whereby a benefit is to accrue to a party or parties named therein, upon the death of a person, which benefit is in any manner conditioned upon persons holding similar contracts." Stat. Mass. 1885, ch. 183, sec. 7; Harding v. Littlehale, 150 Mass. 100; 22 N. E. 703; Laws Cal. 1891.

[3] Chicago Mutual Life Indemnity Ass'n v. Hunt, 127 Ill. 257; 20 N. E. 55; 127 Ill. 257.

are two kinds of benefits paid: those paid on account of sickness of a member, and those which provide a specified sum to be paid at his death to his widow and the orphans, or to a designated beneficiary.

The fraternal orders in this country consist of inferior or local bodies and grand lodges, made up of delegates as chosen representatives from the former, but having its own officers and corporate organization. In collecting assessments and paying benefits, the inferior body generally acts as the agent of the grand lodge. In pure and simple benefit societies, there is no tie that brings or binds the members to each other, except that of pecuniary interest. The members, as a rule, are widely separated both geographically and socially; and the continuance of their connection is optional. Consequently, there is little stability or permanency in such associations. But during their connection the members are as much bound by the constating instruments as by the terms of any special contract they may hold, or as are the members of truly fraternal orders which hold stated meetings.

§ **353. Contracts in benefit society, where found.**—Though different views have been expressed both as to the nature of such contracts, and the proper evidence to establish them, the better view is, that they are to be found not in the constitution and by-laws, nor in the certificate alone, in connection with the application for membership, but in all these considered together. In Van Bibber *v.* Van Bibber,[1] the Supreme Court of

[1] 82 Ky. 350. The constitution, by-laws, rules, and regulations of the defendant's lodge provided that a resort to the civil courts to recover benefits, before the disputed question was submitted to the lodge and taken on appeal in regular order to the sovereign grand lodge, should render any right or claim to any benefits null and void. It was held that this restriction could only affect benefits to members of the lodge, and not benefits to which strangers were entitled by virtue of a contract made in their behalf by a member with the lodge. Strasser v. Staats, 13 N. Y. S. 167.

Kentucky says : "The certificate of membership constitutes the contract ; but it is to be construed and governed by the company's charter. In fact, it may be said that the charter is a part of the contract ; and if it declares who, in a certain event, shall be the beneficiary, the parties cannot alter this legislative direction, because neither the company nor the insured can do anything in violation of it."

In a New Hampshire case, it was said : "The charter, by-laws and certificate of membership, taken together, show what was the understanding of the parties."[1] The expressions of other courts on the subject are vague and fragmentary.[2]

The correct general rule is thus expressed : "If the certificate refers to the laws of the order in such a way as to make them a part of it, then, of course, they are to be considered as a part of the contract ; but if the charter is in general terms and simply provides that the society may conduct the business of paying benefits to its members, and if the by-laws contain no

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[1] Eastman v. Prov. M. Relief Ass'n (N. H.), 20 Cent. L. J. 266; Splawn v. Chew, 60 Tex. 535; Masonic, etc., Ben. Soc. v. Buckhart, 110 Ind. 192; 10 N. E. 79; 11 N. E. 449. Where the constitution of a stock exchange, under which each member binds himself in respect to the manner of his transaction of business and of his right to continue in membership, provides that, when one has lost his seat, the proceeds of the sale of such seat may, by force of constitutional provision, be appropriated to his creditors in the exchange, or to any of the corporate objects, a member who, by offending against the rules, may have forfeited his seat, has no further interest or title in it or its proceeds; and, the privileges of membership having only been conferred upon him on condition that all the rights should revert to the exchange on the happening of certain events, he, having assented to the rules, cannot complain of them as against public policy, nor can his assignee. Belton v. Hatch, 109 N. Y. 593; 17 N. E. 225.

[2] In the by-laws, Dolan v. Court of Good Samaritan, 128 Mass. 437; Charter and by-laws, Hellenberg v. Dist. I. O. O. B., 94 N. Y. 580; Schunck v. Gregenzeiter, etc., 44 Wis. 375. "The contract is contained in the certificates." Worley v. N. W. Masonic Aid Ass'n, 10 F. 228. See also Presbyterian, etc., Fund v. Allen, 106 Ind. 593; 7 N. E. 317; Bauer v. Sampson Lodge, 102 Ind. 262; 1 N. E. 571; Sup. Commandery, etc., v. Ainsworth, 71 Ala. 443; Elkhart M. Aid Ass'n v. Houghton, 98 Ind. 149; Supreme Lodge v. Schmidt, 98 Ind. 374.

restrictions or limitations, then the whole of the contract would be in the certificate. The conclusion, from an examination of all the cases, is that the contract is found in the certificate, if one is issued, but is to be construed and governed by the charter and by-laws of the society, and the statutes of the state of the domicile of the corporation."[1]

§ **354. Limitations as to beneficiaries.**—A leading difference between mutual benefit certificates and ordinary contracts of indemnity or insurance, in addition to the effect of the holder's membership relation, consists in the fact that limitations upon the power to designate and restrictions upon the classes who may be beneficiaries are inserted in charters or in the general laws of most of the states.

The charter or general law authorizing such association usually prescribes who may become members of the company, and their obligations, and who shall be the beneficiaries of the membership after the death of the member, and it is not in the power of the company or of the member, or of both, to alter the rights of those

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Bacon, Ben. Soc. & L. Ins., sec. 162. See also Grand Lodge A.O. U. W. v. Child, 20 Mich. 163; 14 West. Rep. 454; 38 N. W. Rep. 1; Supreme Lodge Knights of Pythias v. Schmidt, 98 Ind. 374; Wendt v. Iowa Legion of Honor, 72 Ia. 682; 34 N. W. Rep. 470; Holland v. Taylor, 111 Ind. 121; 12 N. E. Rep. 116; 9 West. Rep. 606; Supreme Lodge Knights of Honor v. Johnson, 78 Ind. 110; Richmond v. Johnson, 28 Minn. 447; 10 N. 596; Royal Templars of Temperance v. Curd, 111 Ill. 286; Supreme Commandery, etc. v. Ainsworth, 71 Ala. 437; Miner v. Mich. Mut. Ben. Ass'n, 63 Mich. 338; 29 N. W. Rep. 852; 6 West. Rep. 117; Mitchell v. Lycoming, etc., Ins. Co., 51 Pa. St. 402; Mulroy v. Knights of Honor, 28 Mo. App. 463; National Ben. Ass'n v. Bowman, 110 Ind. 355; 11 N. E. 316; Maryland Mut. Ben. Ass'n v. Clendinen, 44 Md. 429; Burbank v. Rockingham Ins. Co., 24 N. H. 550; 57 Am. Dec. 300; Masonic Relief Ass'n v. McAuley, 2 Mackey, 70; Simeral v. Dubuque, etc., Ins. Co., 18 Ia. 319; Susquehanna, etc., Ins. Co. v. Perrine, 7 W. & S. 348; Grand Lodge, etc., v. Elsner, 26 Mo. App. 109; McMurray v. Supreme Lodge, etc., 20 Fed. Rep. 107; Skillings v. Mass. Benev. Assn., 146 Mass. 217; 15 N. E. 566; excluding a creditor; Britton v. Supr. Council (N. Y.), 18 A. 675.

who are thus declared to be the beneficiaries, except in the mode and to the extent therein indicated.[1]

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[1] Kentucky, etc., Ins. Co. v. Miller's Admr., 13 Bush. 489. A divorced wife is entitled to no share of a benefit fund, which by the rules of the association goes to the member's heirs, no beneficiary having been appointed by him. Schonfield v. Turner, 75 Tex. 324; 12 S. W. 626. Under Acts Mass. 1882, c. 195. sec. 2, which provides that mutual benefit societies may make their certificates payable to the "widows, orphans, or other relatives of deceased members, or any persons, dependent upon deceased members," a certificate may be made payable to a member's fiancée, who is supported partly by her own labor and partly by money paid her by such member, though he is under no legal obligation to make such payments. McCarthy v. New England Order of Protection (Mass.), 26 N. E. 866. Where it is provided by statute that the beneficiary fund shall not be liable to be seized, taken, or appropriated by any legal or equitable process, to pay any debt of such deceased member, it was held that a member has no property interest in the beneficiary fund, and a designation of a beneficiary to receive the money and pay the member's debts is invalid. Reversing, 7 N. Y. S. 5; Boasberg v. Cronan, 9 N. Y. S. 664. Adults are not orphan children within the meaning of a regulation that "should there be no widow, then the said amount shall be paid to the lodge of which the deceased was a member, for the use or benefit of his orphan children, in equal shares. In case there should be no widow, child, or children, or designated person or object, the amount shall be paid to his executor or administrator." See Riley v. Riley, 75 Wis. 464; 44 N. W. 112; Hannigan v. Ingraham, 55 Hun, 257; 8 N. Y. S. 232; Walter v. Odd Fellows' Mut. Ben. Soc. (Walter v. Hensell), 42 Minn. 204; 44 N. W. 57; Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543, holding that a mistress or concubine does not come within the scope of a provision that the benefit shall issue to the benefit of "the families, widows, orphans or other dependents" of deceased members; Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543; Murray v. Strang, 28 Ill. App. 608; Young Men's Mut. Life Ass'n v. Harrison, 23 Weekly Law Bulletin, 360, holding that a member's mother comes within the terms "families or heirs" as beneficiary; Arthars v. Baird, 3 Pa. Co. Ct. Rep. 67, 71, as to marriage of member after naming his mother as beneficiary. In Am. Leg. Hon. v. Perry, 140 Mass. 589; 5 N. E. 634, the court say:—"The statute under which the plaintiff corporation is organized gives it authority to provide for the widow, orphans or other persons dependent upon deceased members, and further provides that such fund shall not be liable to attachment. The classes of persons to be benefited are designated, and the corporation has no authority to create a fund for other persons than of the classes named." See also Elsey v. Odd Fellows, etc., Ass'n, 142 Mass. 224; 7 N. E. 844; Leonard v. American Ins. Co., 97 Ind. 305; Presbyterian, etc., Fund v. Allen, 106 Ind. 593; 7 N. E. 317; Knights of Honor v. Nairn (Mich.), 26 N. W. Rep. 826; National, etc., Ass'n v. Gonser, 43 Ohio St. 1; Benef. Soc. v. Dugre, 11 R. L. (Queb.) 344; State v. People's M. Ben. Ass'n, 42 Ohio St. 579. But an appointment of the administrator as beneficiary in a certificate of membership is not inconsistent with the declared object of defendant association "to secure to dependent and loved ones assistance and relief at the death of a member." Eastman v. Provident Mut. Rel. Ass'n (N. H.), 18 A. 745. See also Marsh v. Supreme Council A. L. of Honor, 149 Mass. 512; 21 N. E. 1070.

But in the absence of restrictions in the charter or statute any person may be constituted the beneficiary of a member.[1]

But the rules of construction of the powers of benefit societies and their members in the matter of designating beneficiaries as declared by the courts are not uniform, and an unwarranted liberality has, in some of the cases, been indulged.[2]

But generally a strict construction is given to the power to designate beneficiaries; and a designation beyond the prescribed class held ineffective.[3]

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[1] Eckert v. Mut. Rel. Soc., 2 N. Y. S. 612; Milner v. Bowman, 119 Ind. 448; Massey et al. v. Mutual Relief, etc., Soc., 102 N. Y. 523; 7 N. E. 619; Mitchell v. Grand Lodge, etc., 70 Ia. 30; N. W. Rep. 865; Swift v. Railway, etc., Ass'n, 96 Ill. 309.

[2] In Maneely v. Knights, of Birmingham, 115 Pa. 305; 7 Cent. Rep. 633; 9 Atl. Rep. 41, one of the purposes of the charter of the association issuing the certificate was "the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of the deceased members." The court in construing this provision said:—"While it is true that the general purpose of the corporation is there stated to be the maintenance of a society for benefiting and aiding widows and orphans of deceased members, it must be observed that this is only the statement of a general purpose. It is only the recital of an object sought to be accomplished, and which doubtless is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be paid to the other persons than the widows or orphans." See also Massey v. Mutual Relief, etc., Soc., 102 N. Y. 523; 7 N. E. 619; Mitchell v. Grand Lodge, etc., 70 Ia. 360; 30 N. W. 865; Swift v. Railway, etc., Ass'n, 96 Ill. 309; Bloomington Mut., etc., Ass'n v. Blue, 120 Ill. 127; 11 N. E. 331; Mut. Ben., etc., Assn. v. Hoyt, 46 Mich. 473; Lamont v. Grand Lodge, etc., 31 Fed. Rep. 177. An old friend of a member of a benevolent society, who has lived with him for years, and is physically disabled, is not a member of his family, so as to be able to take the benefits of a benevolent insurance policy, payable only to such a member. Knights of Honor v. Nairn, 26 N. W. 826; 60 Mich. 44. See also Lyon v. Rolfe, 76 Mich. 146; 42 N. W. 1094, holding that the assignment of a policy by a member of complainant to a brother of the assignor's wife, having no insurable interest in the life of the assignor, was void.

[3] Bacon, Ben. Soc. & Life Ins. Co., 244; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. 826; American Legion of Honor v. Perry, 140 Mass. 580; 5 N. E. 634; 1 N. Eng. Rep. 715; Ballou v. Gile, etc., 50 Wis. 614; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. 816; Elsey v. Odd Fellows, etc., 142 Mass. 224; 2 N. Eng. Rep. 667; 7 N. E. 844; Daniels v. Pratt, 143 Mass. 216; 10 N. E. 166; 3 N. Eng. 480; National Mut. Aid, etc., v. Gonser, 43 Ohio St. 1; 1 West.

§ 355. **Designation, how made.**—The principal object of benefit societies, and hence the object of becoming members therein, is the payment of relief and death benefits. Relief benefits are payable to the member himself, in case of sickness or disability, while a specified sum, as the death benefit, is usually agreed to be paid by the association to a beneficiary named in the

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Rep. 4; 1 N. E. 11; State v. People's Mut. Ben. Ass'n, 42 Ohio St. 579; State v. Moore, 38 Ohio St. 7; State v. Standard Life Ass'n, 38 Ohio St. 281; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826; Ky. Masonic Mut. L. Ins. Co. v. Miller's Admr., 13 Bush. 489; Van Bibber's Admr. v. Van Bibber, 82 Ky. 347; Duval v. Goodson, 79 Ky. 224; Masonic Mut. Rel. Ass'n v. McAuley, 2 Mackey, 70; Worley v. N. W. Masonic Aid Ass'n, 10 F. 227; Expressmen's, etc., v. Lewis, 9 Mo. App. 412; Presby. Ass'n Fund v. Allen, 106 Ind. 593; 7 N. E. 317; 4 West. Rep. 712; Deitrich et al. v. Madison Rel. Ass'n, 42 Wis. 79; Highland v. Highland, 109 Ill. 366; Addison v. N. E. Com. Trav. Ass'n, 144 Mass. 591; 4 N. Eng. Rep. 639; 12 N. E. Rep. 407; Skilling v. Mass. Ben. Ass'n, 146 Mass. 217; 15 N. E. Rep. 566; 5 N. Eng. Rep. 718; Rice v. New England M. A. Soc., 146 Mass. 248; 5 N. Eng. Rep. 813; 15 N. E. Rep. 624; Daniels v. Pratt, 143 Mass. 221; 10 N. E. 166; 3 N. Eng. Rep. 480; National Mut. Aid Ass'n v. Gonser, 43 Ohio St. 1; 1 West. Rep. 4; 1 N. E. 11. In Daniels v. Pratt, supra, the deceased had designated as his beneficiary "my estate," whereas the law under which the association was organized authorized such organizations to provide for a benefit for the family widow, relations, orphans or other dependents of deceased members. The court held that the designation was invalid and said:—"If it were a part of his estate it would be assets for a payment of debts and expenses of administration, and would be subject to an unrestricted disposition by will. But this is inconsistent with the statutes, and so beyond the powers of the parties." In National Mut. Aid Ass'n v. Gonser, supra, under a similar statute the court held invalid the designation made by the deceased. In Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. 826, the court say:—"It appears that under a Kentucky charter, and under the constitution as it stood prior to 1884, the benefits could be made payable to his family, or as the member should direct. This, apparently, would have made Nairn a competent beneficiary, if we can regard these constitutions as controlling the contract. But this benefit is payable by a corporation of the state of Mo., and the laws of that state very clearly and expressly forbid corporations of this sort from paying benefits to any but the member's family or dependents. This prohibition is further strengthened by some future provisions making it unlawful to issue policies of life insurance, or for the benefit of the members themselves in any shape. The restrictions imposed by the laws of Missouri cannot be abrogated or changed by the corporation, and it cannot subject itself to any outside control which will override the laws of its organization as a corporate body. The intent of the prohibition is clearly to shut out all persons who are not actual relatives, or standing in the place of relatives in some permanent or in some actual dependence on the members."

certificate; and in case no one is named, it is sometimes provided in the by-laws that it should go to his widow, orphan children or next of kin. Sometimes it is provided that in case no designation be made by the member during his life, the fund shall revert to the society. Whatever provisions on the subject are contained in the constitution and by-laws are binding upon the members as part of the contract, especially if referred to therein. Of these the member is conclusively presumed to have taken notice and consented when he became a member.[1]

A more liberal view prevailed in the following cases :—Maneely v. Knights of Birmingham, 115 Pa. St. 305; 9 Atl. Rep. 41; 7 Cent. Rep. 633; Falmer's App., 87 Pa. St. 135; Lamont v. Grand Lodge Ia. Leg. of Hon., 31 F. 177; Sup. Lodge Knights of Hon. v. Martin et al. (Pa.), 12 Ins. L. J. 628; Bloomington Mut. L. Ins. Ass'n v. Blue, 120 Ill. 121; 11 N. E. 331; 8 West. Rep. 642; Lamont v. Hotelmen's Association, 30 F. 817; Lamont v. Grand Lodge Ia. Leg. of Hon., 31 F. 177. The reasoning of these cases is thus ably advanced in Maneely v. Knights, etc., supra:—"While it is true that the general purpose of the corporation is there stated to be the maintenance of a society for benefiting and aiding widows and orphants of deceased members, it must be observed that this is only the statement of a general purpose. It is only the recital of an object sought to be accomplished, and which doubtless is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be paid to other persons than the widows and orphans. There is no prohibitory or restrictive language excluding from the powers of the corporation the right to contract specially with the members for the payment of benefits to other persons than his widow or orphants, nor is such a contract to be held void by reason of any necessary implication from the language of the charter, for the widows and orphans may be much benefited and in many ways by a contract designating another beneficiary, as, for instance, if the member in his lifetime, desiring to establish a home for his wife and children which they might hold after his death, borrowed money for that purpose and so used it to secure the loan, designated the lender as a beneficiary of his membership. Certainly his widow and orphans would be most materially benefited by such an arrangement, or if having a home he met with disaster and was about to lose it by judicial sale and should save it by a similar provision, his widow and orphans would be benefited thereby." Mr. Bacon makes the following comment on this case:—"It must be noted, however, as to this case, that, by the language of the charter, the object of the corporation was not *to pay* to the widows and orphans, etc., but *for the purpose of benefiting and aiding* the widows and orphans, etc. Other cases tend to support this liberal view, though none go so far."

[1] Hellenberg v. District No. 1., etc., 94 N. Y. 580; Hamberstein v. Parsons, 29 Mo. App. 509; Maryland Mut. B. Ass'n v. Clendinen, 44 Md. 429; Arthur et al. v. Odd Fellows' Ben. Ass'n, 29 O. St. 557; Rel. Ass'n v. McAuley, 2 Mac-

§ 356. **Nature of member's interest.**—While all the duties of membership imposed in this dual contract are obligatory upon the member and upon no one else, yet he has under the contract no property interest in the death benefit but simply the power to designate some one to receive it.[1]

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key, 70; Barton v. Prov. Rel. Ass'n, 63 N. H. 535; 3 A. 627; Richmond v. Johnson, 28 Minn. 447; 10 N. E. 596; Greeno v. Greeno, 23 Hun, 478; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189; 10 N. E. 79; 7 West. Rep. 527; Van Bibber's Admr. v. Van Bibber, 82 Ky. 347; Worley v. Northwest Masonic, etc., 10 F. 227; Ky. Masonic, etc., Ins. Co. v. Miller, 13 Bush, 489.

[1] Maryland Mut. Ben. Soc. v. Clendinen, 44 Md. 433, giving the following definition of a power :—" A liberty or authority reserved by or limited to a party to dispose of real or personal property for his own benefit, or for the benefit of others, and operating upon an estate or interest, vested either in himself or in some other person. The liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it either wholly or partially." It is a mere naked power. Bloomer v. Waldron, 3 Hill, N. Y. 365. See also, Greeno v. Greeno, 23 Hun, 479; Masonic Mut. R. Ass'n v. McAuley, 2 Mackey, 70; Barton v. Provident Mut. Rel. Ass'n, 63 N. H. 535; 3 A. 627; 1 N. Eng. 856; Eastman v. Prov. Mut. R. Ass'n (N. H.), 20 C. L. J. 266; Worley v. N. W. Mas. Aid Ass'n, 10 F. 227; Gentry v. Sup. Lodge K. of H., 23 F. 718; Richmond v. Johnson, 28 Minn. 447; 10 N. E. 596; Swift v. Ry. Cond. Mut. Ass'n, 96 Ill. 309; Presby. Ass'n v. Allen, 106 Ind. 593; 7 N. E. 317; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189; 10 N. E. 79; 7 West Rep. 527; Ky. Masonic Mut. Life Ins. Co. v. Miller, 13 Bush, 489; Van Bibber's Admr. v. Van Bibber, 82 Ky. 347; Sup. Counc. Catholic M. B. A. v. Priest et al., 46 Mich. 429; 9 N. W. 481; Durian v. Central Verein, 7 Daly, 168; Tenn. Lodge v. Ladd, 5 Lea, 716; Arthur v. Odd Fellows, B. Ass'n, 29 Ohio St. 557; Duval v. Goodson, 79 Ky. 224.

The residuary legatees under the will of a deceased member who had left no wife or children sued to recover the benefit not specially mentioned in that will. The provision in the charter of the defendant upon the subject was that the fund should be paid upon the death of a member "to the widow, child, children or such person or persons to whom the deceased may have disposed of the same by will or assignment." It was further provided that the balance of the benefit after payment of funeral expenses should revert to the society. The court in deciding for defendant said:—" It is possible—and we need not consider under what circumstances—that when a member has executed and delivered to the reporter (secretary) his attested surrender in favor of a competent beneficiary, his death, before a new certificate is issued, may leave his power of designation so far executed as to enable a court of equity to relieve against the accident." The member of a benefit association having no interest or property in the fund stipulated to be paid on his death to his appointee, but simply the power of appointment, failure so to appoint leaves the fund to be disposed of as provided for in the contract creating the power, and if no disposition is so provided for, then there is a total lapse of the power and the fund will revert to the society.

The charter and by-laws of the corporation constitute the terms of an executory contract, to which the applicant assents when he accepts admission into the association.[1]

But there is a distinction between the member's relation to the benefit itself and his right to designate the recipient of that fund. The latter, as has been frequently decided, is a part of his contract of membership, and therefore possesses a property value to be protected as such.[2]

§ 357. **Requisites of valid designation.**—The power to designate a beneficiary given in a certificate, or in constating instruments referred to in such certificate, must be executed in strict compliance with the terms of the instrument or instruments conferring it.[3]

For instance, power to designate by deed cannot be executed by will, or *vice versa*.[4] Where power is given

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In no case is this fund assets, and if collected by the executor or administrator it is to be regarded as a trust fund held for the benefit of the person entitled to it, and the creditors cannot share in it." Arthur v. Odd Fellows' Ben. Ass'n, 29 O. St. 558.

[1] Hellenberg v. Dist. No. 1, I. O. B. B., 94 N. Y. 580. In this case defendants' charter provided that the benefit should be "paid to the wife of the deceased, if living, and if dead to his children, and if there are none, then to such person as he may formally have designated to his lodge prior to his decease." The deceased member having no wife or children designated his mother, who died before him. But before his mother's death, and after she had been so designated, he made a will by the terms of which his mother was to have the benefit, and in case of her prior decease, then his brother was to have the benefit. It was held that the designation of the brother was valid, and that the executor under the will could not recover the fund for the benefit of the estate. See also Bishop v. Empire Ord. Mut. Aid Soc., 43 Hun, 472.

[2] Infra, Ch. XXVI.

[3] Elliott v. Whedbee, 94 N. C. 115; Sup. L. K. & L. of H. v. Grace, 60 Tex. 571; 1 Sugden on Powers, 250, 255; Am. Legion of Honor v. Perry, 140 Mass. 580; 5 N. E. Rep. 634; 1 N. Eng. 715; 2 Washb. on Real Prop. 317; Presby. Fund v. Allen, 106 Ind. 593; 7 N. E. 317; 4 West. 712.

[4] 2 Washb. on Real Prop. 317; 1 Sugden on Powers, 255; Worley v. N. W. Masonic Aid Soc.; 10 F. 227; Daniels v. Pratt, 143 Mass. 216; 10 N. E. 166; 5 N. E. 634; 3 N. Eng. 480.

to designate by will, the designation must be therein specially made, and the benefit does not pass under a general disposition of all the testator's property, nor under a residuary clause.[1]

§ 358. Failure to designate—Defective designation.—"The member of a benefit association having no interest nor property in the fund stipulated to be paid on his death to his appointee, but simply the power of appointment, failure so to do leaves the fund to be disposed of as provided for in the contract creating the power, and if no disposition is provided for, then there is a total lapse of the power, and this fund will revert to the society. In no case is this fund assets, and if collected by the executor or administrator, it is to be regarded as a trust fund held for the benefit of the person entitled to it, and the creditors cannot share in it."[2]

But this disposition of the benefit is determined by the charter and by-laws of the society, and if these provide otherwise the benefit will be disposed of accordingly.[3]

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[1] Arthur v. Odd Fellows' Ass'n, 29 Ohio St. 557; Bown v. Catholic M. Ben. Ass'n, 33 Hun, 263; Maryland Mut. Ben. Ass'n v. Clendinen, 44 Md. 429; Greeno v. Greeno, 23 Hun, 478; Hellenberg v. Dist. No. 1, I. O. B. B., 94 N. Y. 580; Morey v. Michael, 18 Md. 241; Highland v. Highland, 109 Ill. 366; Eastman v. Prov. R. Soc. (N. H.), 20 Cent. L. J. 267. Contra, St. John's Mite Soc. v. Buckly, 5 Mackey (D. C.) 406; 6 Cent. Rep. 292; Kepler v. Sup. L. Knights of Honor, 45 Hun, 274.

[2] Bacon, Ben. Soc. & L. Ins., sec. 241. A certificate issued by the society mentioned no beneficiary other than the member, but provided that the benefits should be paid "subject to will." The member died intestate, leaving a wife and three children. It was held that creditors of the member had no right or title to the money to be procured upon the certificate. Beeckel v. Imperial Council of the Order of the United Friends, 11 N. Y. S. 321.

[3] Eastman v. Prov. Rel., etc., Soc., 20 C. L. J. 266; Swift v. San Francisco S., etc., E. Board, 67 Cal. 567; 8 P. 94; Hellenberg v. Dist. No. 1, I. O. B. B., 94 N. Y. 580; Worley v. N. W. Mas. Aid Ass'n, 10 F. 227; Daniels v. Pratt, 143 Mass. 216; 10 N. E. 166; 3 N. Eng. 480; McClure v. Johnson, 56 Ia. 620; 10 N. 217; Maryland, etc., v. Clendinen, 44 Md. 429; Greeno v. Greeno, 23 Hun, 478; Gould v.

But where the certificate named the devisees of the member as beneficiaries and the charter of the association declared the objects of the association to be "to afford financial aid and assistance to the widows, orphans, heirs or devisees of deceased members," and the member died intestate, it was held either the devisees *or* the heirs should take the benefit; in other words, if there were no devisees, then the intent was that the heir was entitled to the benefit.[1]

Where there is not a total failure to designate, but only a defective designation, and enough appears to clearly establish an attempt in good faith to execute the power, equity will interfere to remedy the defect.[2]

Emerson, 99 Mass. 154; Van Bibber's Admr. v. Van Bibber, 82 Ky. 347; Duvall v. Goodson, 79 Ky. 224; Masonic Rel. Ass'n v. McAuley, 2 Mackey, 70; Balloe v. Gile, etc., 50 Wis. 614; Am. Leg. of Hon. v. Perry, 140 Mass. 580; 5 N. E. 634; 1 N. Eng. 481; Whitehurst Admr. v. Whitehurst, 83 Va. 153; 1 S. E. Rep. 801; Covenant Mut. Benefit Ass'n v. Sears et al., 114 Ill. 108; Fenn v. Lewis, 10 Mo. App. 478. In a case where the disposition of a benefit was in dispute, the court say:—"It is not to be supposed that a father, on procuring insurance on his own life for the benefit of his family, or in keeping such a policy alive, intends to benefit himself or his estate, and especially is that true when, by the terms of the charter of the company in which he insures, with which he must be supposed to be familiar, he cannot take insurance for the benefit of any one except his wife or children, if he have either, and cannot dispose of the insurance if he leave wife or children surviving. We, therefore, conclude that the charter gave the member a mere power of appointment in case he has neither wife nor child, and that he has no interest whatever in the fund, and, therefore, it did not pass under a will merely disposing of all his estate, but in which no mention is made of the fund to arise from his membership." Duvall v. Goodson, 79 Ky. 224. See also McClure v. Johnson, 56 Ia. 620; 10 N. W. 217; Wason v. Colburn, 99 Mass. 342; Morley v. N. W. Mas. Aid Ass'n, 10 F. 227; Eastman v. Prov. Mut. Rel. Ass'n (N. H.), 20 Cent. L. J. 266.

[1] Cov. Mut. Ben. Ass'n v. Spies, 114 Ill. 463; 2 N. E. 482. See also Smith v. Cov., etc., Ass'n, 24 F. 685.

[2] 1 Story Eq. Jur. 181, 182; Scott v. Prov. Mut. R. Ass'n, 63 N. H. 556; 2 N. Eng. Rep. 286; 4 A. 792; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. 826. In the last case cited the court said:—"It is impossible—and we need not consider under what circumstances—that when a member has executed and delivered to the reporter (secretary) his attested surrender in favor of a competent beneficiary, his death, before a new certificate is issued, may leave his power of designation so far executed as to enable a court of equity to relieve against the accident."

Where under the laws a creditor was capable of becoming a beneficiary as

The same principles of equity jurisprudence apply in these as in other cases of defective execution of powers.

§ 359. Change of beneficiary.—The power to designate a beneficiary given in a certificate of membership in a mutual benefit society is, unless limited in this respect, revocable as in other cases where a power is conferred. This arises from the fact that the act of designation is testamentary in its character, and therefore subject to the rules governing testamentary writings.[1]

Still, if the right to change be expressly given in the by-laws entering into the contract of membership, it may be equally correct to say that the act is, in part, execution of a contract.

As has been stated the member has no property right in the benefit.[2]

The same is true of the person named as beneficiary prior to the happening of the event upon which it is to become vested in him, usually the death of the member. This is because of the contingent and uncer-

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legatee by the member so ordering during his lifetime, it was held that an assignment of the certificate by the member in his lifetime to the creditor as security for the debt was but an irregularity in the mode of designation, which could not be questioned by the widow, the society having recognized it as valid, Martin v. Stubbings, 126 Ill. 387; 18 N. E. 657.

[1] Duvall v. Goodson, 79 Ky. 228; National American Ass'n v. Kirgon, 28 Mo. App. 80; Washington Ben. Fund. Ass'n v. Wood, 4 Mackey, 19; Continental Life Ins. Co. v. Palmer, 42 Conn. 64; 19 Am. Rep. 530; Union Mut. Aid Ass'n v. Montgomery, 70 Mich. 587; 38 N. W. 588; 14 West Rep. 877; Thomas v. Leake, 67 Tex. 469; 3 S. W. Rep. 703. In Sanger v. Rothschild, 2 N. Y. S. 794, it was held that marriage operated as an annulment of a preceding designation. But see Mass. Cath. O. F. v. Callahan, 146 Mass. 391; 16 N. E. 14. In Given v. Wis. O. F. M. L. Ins. Co., 71 Wis. 547; 37 N. W. 817, where the wife of the member had been designated as beneficiary but died before his death, it was held this operated as a revocation so far that her heirs could not take the benefit, notwithstanding a statute which "empowers a husband to insure his life in favor of his wife, and provides that such insurance shall inure to her separate use, and that of her children."

[2] Supra, § 356.

tain nature of his interest, it being liable to defeat and termination by the member exercising his power to revoke the appointment and substitute a new beneficiary.[1]

This constitutes the principal distinction between benefit certificates and ordinary insurance policies; the interests under the latter being vested interests, and not subject to alteration without consent of all the parties thereto.[2]

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[1] Union Mut. Aid Soc. v. Montgomery, 70 Mich. 587; 38 N. W. 588; Knights of Honor v. Watson (N. H.), 15 A. 125; Luhrs v. Supreme Lodge Knights and Ladies of Honor, 54 Hun, 636; 7 N. Y. S. 487; Supreme Council Catholic Knights v. Morrison (R. I.), 17 A. 57. Supreme Council Catholic Knights of America v. Franke (Ill.), 27 N. E. 86. In Byrne v. Casey, 70 Tex. 247; 8 S. W. 38, it was held that where "the constitution of a mutual benefit society provides that its by-laws may be amended at any time, a beneficiary in a benefit certificate, resulting from the insured's membership therein, who is not a member of the society, cannot complain that a by-law in existence at the time the certificate was issued, providing that the member may surrender the certificate, and receive a new one, with the consent of the beneficiary, was amended so as to omit the consent of the beneficiary." The right to change without the consent of the beneficiary is not affected by the fact that the latter is a creditor. Smith v. Nat. Ben. Soc., 51 Hun, 575; 4 N. Y. S. 521.

[2] Bacon, Ben. Soc., & L. Ins., secs. 289, 292; Bliss L. Ins., sec. 318; Harley v. Heist, 86 Ind. 196; 44 Am. Rep. 285; Holland v. Taylor, 111 Ind. 121; 12 N. E. 116. In Holland v. Taylor, supra, the court says:—"For many, and, indeed, for most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance. The most usual difference is the power on the part of the assured in mutual benefit associations to change the beneficiary. But, as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution, or by the laws of the association or by the terms of the certificate." See also, Presby. Fund Ass'n v. Allen, 106 Ind. 593; Elkhart Mut. Aid Ass'n v. Houghton, 103; Ind. 286; 2 N. E. 763; 53 Am. Rep. 514; Bauer v. Sampson Lodge, etc., 102 Ind. 262; 1 N. E. 571. In Barton v. Prov. R. Ass'n, 63 N. H. 535; 3 A. 627. the following reasoning was advanced to support the view that the beneficiary has no interest in such certificates:—"The power of direction as to the object of the benefit is given to the member both in the by-law and in the certificate of membership, and there is nothing in either tending to show that the power is exhausted and another beneficiary cannot be substituted. The power of selection is unlimited as to persons, and is limited in time only by the death or the

§ 360. Change must be made in pursuance of by-laws.— The formalities which the by-laws of the association prescribe in the matter of changing the beneficiary must be complied with, else, according to the great preponderance of authority, the attempted revocation and substitution are invalid and ineffective. Such change, like the original designation, is but the execution of a power which, as we have seen, must be by the instrument, and executed in the manner pointed out by the grantor of the power.[1]

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control of the member until death, and the provision for paying the benefit to the person named in the certificate at the death of the member, as then appears, leaves the power to appoint the beneficiary continuous until that event. The power of appointment is the one thing in the contract which is given to the member, and over that power no other person has any control. The right of its free exercise requires its continuance until death." See also Weil v. Trafford, 3 Tenn. Ch. 103; Swift v. Railway, etc., Ben. Ass'n, 96 Ill. 309; Richmond v. Johnson, 28 Minn. 447; 10 N. 596.

[1] McCarthy v. New Eng. Ord. Protec. (Mass.), 26 N. E. 866; Hotelmen's, Mut. Ben. Ass'n v. Brown, 33 F. 11; Order Mut. Companions v. Greist, 76 Cal. 494; 18 P. 652; Knights of Honor v. Nairn, 60 Mich. 44; Supr. Council v. Smith (N. J.), 17 A. 770; Hainer v. Leg. of Hon., 78 Ia. 245; 43 N. W. 185.

In Holland v. Taylor, 111 Ind. 121, the court said:—"We think that, taking the by-laws and the certificate together, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract, the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract." Stephenson v. Stephenson, 64 Ia. 534; 21 N. W. 19. In the last case it was said:—"Counsel for the plaintiffs insist that where a power is reserved and no mode of executing it is provided, it may be executed by will. Possibly this is so, but whether so or not, it will be conceded for the purpose of this case. One difficulty in the application of such a rule for this case is, that a mode of executing the reserve power is provided in the contract, and it is conceded that such a mode was not adopted. It was perfectly competent for the parties to contract as they did, and the mode of executing the reserve power provided in the contract cannot be regarded as an idle ceremony, because substantially a new contract was made upon its being complied, and thereby all doubt upon the part of the association as to who was the beneficiary was removed. Because such mode was not adopted in this case, creates the doubt we are called upon to solve. We, therefore, think the mode agreed upon in the contract, whereby the name of the beneficiary should be changed, was made a matter of substance, and should be complied with."

Where the constitution provided "that any member holding a certificate may make a new direction as to its payment by authorizing such change in writing

It is often provided that no change shall be made without the consent of the association. Most of the cases calling in question the validity of changes have arisen from attempts to change the beneficiary in violation of such provision and the courts have, almost without exception, held such attempt to have been abortive.[1]

Where a member of a mutual benefit society attempts to change the beneficiary named in his certificate, and complies with all the regulations of the society in making the change, except that he does not surrender

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on the back of his certificate, attested by the recorder, with the seal of the lodge attached; or, if this be impracticable, that attestation may be made by a notary public or an officer of a court of record, seal to be attached in attest, this provision was held to be merely directory, and absence of such attestation can only be objected to by the society, and not by claiming as a beneficiary. Titsworth v. Titsworth, 40 Kan. 571; 20 P. 213, holding also that under laws of Kansas the death of the beneficiary of a member of the A. O. U. W. is not a pre-requisite to a change of beneficiary. A recital in an endorsement made by the secretary on a certificate of membership in a mutual benefit association, that, at the written request of the holder of the certificate, the beneficiary was changed from his brother to his wife, is sufficient evidence of a compliance with the by-laws of the association, which provide that a change of beneficiary may be made on the written order of the holder of the certificate, signed in the presence of two witnesses. Gladding v. Gladding, 56 Hun, 639; 8 N. Y. S. 880. See Supreme Conclave Royal Adelphia v. Cappella, 41 F. 1; Sabin v. Grand Lodge of A. O. U. W., 55 Hun, 603; 8 N. Y. S. 185; National American Ass'n v. Kirgin, 28 Mo. App. 80; Brown v. Grand Lodge of Ia., 80 Ia. 287; 45 N. W. 884. The transfer, by a member of a mutual benefit society, of a certificate issued to him by the society, is not invalid because made to one having no insurable interest in his life, unless such transfer is itself a wagering contract. McFarland v. Creath, 35 Mo. App. 112. But see Schonfield v. Turner, 75 Tex. 324; 12 S. W. 626.

[1] Bacon, Ben. Soc. & L. Ins., sec. 307. See also National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111; Gentry v. Knights of Honor, 23 Fed. 718; 20 C. L. J. 393; Ireland v. Ireland, 42 Hun, 212; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. 826; Folman's Appeal, 92 Pa. St. 50; Elliott v. Whedbee, 94 N. C. 115; Highland v. Highland, 109 Ill. 366; Greeno v. Greeno, 23 Hun, 478; Ky. Mas. M. Ins. Co. v. Miller, 13 Bush, 489; Manning v. Supreme Lodge A. O. U. W., 5 S. W. 385; 7 Ky. Law Rep. 751; Renk v. Herrman Lodge, 2 Demar, 409; Olmstead v. Masonic Mut. Ben. Soc., 37 Kan. 93; 14 Pac. Rep. 449; Basye v. Adams, 81 Ky. 368; Daniels v. Pratt, 143 Mass. 216; 10 N. E. 166; Harman v. Lewis, 24 F. 97, 530; Eastman v. Prov. Mut. Ass'n (N. H.), 20 C. L. J. 266; Hotelmen's M. Ben. Ass'n v. Brown, 33 F. 11. To such cases the maxim "*expressio unius est exclusio alterius*" applies. Coleman v. Knights of Honor, 18 Mo. App. 189; Olmstead v. Masonic Mut. Ben. Soc., 37 Kan. 93; 14 P. 449.

the certificate as required by the by-laws, being unable to do so because the certificate has been wrongfully taken from him, his mortuary benefit should be paid to the person whom he attempted to substitute as beneficiary, since the by-laws cannot require impossibilities.[1]

The by-laws sometimes require the consent of the original beneficiary as a condition precedent to making the change. But such consent is not necessary to an amendment of the by-law, so as to allow the change to be made without his consent.[2] A rule contrary to the general view above expressed has been followed in Texas and Kentucky.[3]

§ 361. Change cannot be defeated by default of association.—On the same principle as that on which a defective designation of a beneficiary will be aided in equity, an honest attempt to conform to the requirements of the by-laws of the association has sometimes been given effect, though compliance had for some cause become impossible, or was prevented by some act of the agents or officers of the association.[4]

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[1] Following Grand Lodge v. Child, 38 N. W. 1; Isgrigg v. Schooley (Ind.), 25 N. E. 151.

[2] Byrne v. Casey, 70 Tex. 247; 8 S. W. 38. The same principle applied where a third party in possession of the certificate had paid the assessments thereon. Fisk v. Eq. Aid Union (Pa.), 11 A. 84.

[3] Splawn v. Chew, 60 Tex. 532; Manning v. A. O. U. W., 86 Ky. 36; 5 S. W. 385. See also 3 Mackey, 68; 46 Mich. 429; Nally v. Nally, 74 Ga. 669.

[4] Hirshl v. Clark (Ia.), 47 N. W. 78. In Grand Lodge A. O. U. W. v. Child, 70 Mich. 163; 38 N. W. 1, where the certificate was withheld from the member against his will, by a third party, and by-laws required its surrender before allowing the change to be made. In this case the court say:—"All contracts are presumably made in view of the law governing their construction, and the rules of evidence applicable when the contract is sought to be established and applied. The law never requires impossibilities, and the rules of the order which required the certificate to be surrendered when a change of the beneficiary was made, that it might be endorsed upon the certificate, could only be construed as requiring that to be done when the certificate was in existence. The existence of the right to share in the benefits of the order, and to direct who should receive the fund in case of the death of the member, was a right vested in the member

The limitations in by-laws, statutes and charters, upon the classes of persons entitled to share in the death benefit fund, cannot be evaded by changing the beneficiary from one within to one without the prescribed class.[1]

If such changes were allowed, the entire purpose and policy of such laws would be defeated.

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as soon as he became entitled thereto, and the certificate was only evidence of the existence of that right, and where that evidence was lost the right remained, and its existence could be established by any other competent evidence, and the same is true of the existence of the change directed by the member of the beneficiary." In Luhrs v. Luhrs (N. Y.), 25 N. E. 388. A certificate was surrendered in the manner prescribed, designating a new beneficiary, but the member died while it was in course of transmission. The supreme reporter, ignorant of the fact, issued a new certificate. Both certificates bore at the bottom a printed form of acceptance, and the member had signed his name thereto on the old one. It was held that the right to the new certificate attached when the old one was surrendered to the home lodge, and the new one, when issued, related back to that time, notwithstanding that the acceptance could not be signed, and therefore the new beneficiary was entitled to the fund. A provision on a certificate of membership in a mutual benefit association, empowering the member to change the beneficiary by "writing filed with the association," is substantially complied with by the member's written request, filed with the association, to substitute his executors, named in a will of a designated date, for the beneficiary named in the certificate; and an indorsement by the secretary on the certificate making the change. Bowman v. Moore (Cal.), 25 P. 409. A member of a beneficial society, within a few hours of his death, sent the certificate of the insurance to the president of his lodge, with the request that it should be transferred to new beneficiaries. It was held upon the suit of the original beneficiary, that an indorsement of the certificate made by the president of the lodge, in accordance with the verbal message of the owner of the certificate, was sufficient to effect a change of beneficiaries. Schmidt v. Ia. Knights of Pythias Ins. Ass'n (Ia.), 47 N. W. 1032. But where the by-laws of a mutual benefit association provide that the beneficiary in any certificate may be changed by its surrender and the payment of a fee, whereupon a new certificate would issue to the new beneficiary, a mere indorsement on a certificate by the holder thereof directing payment to one other than the beneficiary named therein, is not sufficient to entitle such other to receive the benefit. Jinks v. Banner Lodge No. 484 of Ladies and Knights of Honor (Pa.), 21 A. 4.

[1] Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. 826; Maneeley v. Knights of Birmingham, 115 Pa. St. 305; 9 A. 41; American Leg. of Honor v. Perry, 140 Mass. 580; 5 N. E. 634; Folmer's Appeal, 87 Pa. St. 133; Elsey v. Odd Fellows, Rel. Ass'n, 142 Mass. 224; 7 N. E. 844; Daniels v. Pratt, 143 Mass. 216; 10 N. E. 166; State v. Standard Life Ass'n, 38 Ohio St. 281; Ky. Mas. Ins. Co. v. Miller, 13 Bush. 489; Weisert v. Muehl, 81 Ky. 336; Basye v. Adams, 81 Ky. 368; Nat. Mut. Aid Assn'n v. Gonser, 43 Ohio St. 1; 1 N. E. 11; In re Phillips' Ins., 23 Ch. D. 235; 52 L. J. Ch. 441; 48 L. T. 81; 31 W. R. 511, C. A.

But where there are no limitations the member may exercise his right to change without limit and as often as he sees fit, unless the doctrine of insurable interest interferes.[1]

§ **362. Obligations assumed in contract.**—The duties of members of non-capital stock corporations are as varied as the forms of organization and the objects for which they may be formed, and are subject to be made lighter or more onerous as often as the necessities and objects of the particular institution are varied, or as the controlling power therein sees fit to enact, repeal or amend the by-laws.

§ **363. Personal distinguished from other duties.**—There is a marked distinction between merely personal duties arising from the relations and intercourse of the members with each other and the pecuniary obligations incident to membership in such associations. With respect to the latter, very nearly the same legal and equitable principles apply to their performance and enforcement, and the similar results flow from their non-performance as in capital stock corporations.

In neither can contributions from members be exacted beyond what is required to carry out and perform legitimate objects.

§ **364. Assessments.**—Substantially the same rules govern in laying and collecting assessments and giving notice thereof in all corporations and in unincorporated associations; and there must be the same strict compliance with prescribed formalities.[2] The only proper

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[1] Maneeley v. Knights of Birmingham, 115 Pa. St. 305; 9 A. 41; Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 127; 11 N. E. 331.

[2] Baltimore & Ohio Employes' Rel. Ass'n v. Post, 122 Pa. 579; 15 A. 885; Garreston v. Equitable Mutual Life & Endowment Ass'n, 74 Ia. 419; 38 N. W. 127; Gunther v. New Orleans Cotton Exch. Mut. Aid Soc. (La.), 5 So. 65.

use which mutual benefit societies can make of money derived from assessments and dues is the payment of benefits, losses and expenses. The manner of creating as well as of disbursing the funds should be in all cases, and generally is, specified in the organic and adopted laws, rules and regulations of the society; and as the result of non-payment is usually a forfeiture of property interests, and often of membership, these provisions are construed strictly.[1]

Assessments in mutual insurance and benefit societies will not be binding: 1st. Unless made upon one who was a member at the time. 2d. The losses for which it is made must have occurred during his membership. 3d. It must be made by the proper authority, and according to the prescribed laws of the association.[2] The authority may not be delegated, but the

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Where by-laws require notice of each assessment to be sent to the member at his last-known post-office, sending the notice is an essential part of the "notice" or "assessment," and, unless done within a reasonable time after its date, the 30 days allowed for payment do not run from such date. Stanley v. Northwestern Life Ass'n, 36 F. 75. Under by-laws providing that notice shall be given of assessment due before there shall be a forfeiture, notice to a member put in the mail, directed to him, but not shown to have reached him, is insufficient to support a forfeiture. McCorkle v. Texas Ben. Ass'n, 71 Tex. 149; 8 S. W. 516.

[1] Bates v. Detroit Mut. Ben. Ass'n, 51 Mich. 587; 17 N. W. 67. Members have a right to rely upon a faithful observance of charter and by-law provisions, and the directors have no right to make an assessment otherwise than in accordance with such requirements. Underwood v. Ia. Legion of Honor, 66 Ia. 134; 23 N. W. 300; Bates v. Detroit Mut. Ben. Ass'n, 51 Mich. 587; 17 N. W. 67; Passenger Conductors' Ass'n v. Birnbaum (Pa.), 10 Cent. Rep. 63; 11 Atl. Rep. 378; Covenant Mut. Ben. Ass'n v. Spiers, 114 Ill. 463; 2 N. E. 482; Protection L. Ins. Co. v. Foote, 79 Ill. 362; Woodfin v. Ashville, 6 Jones' L. (N. C.) 558. The directors in making assessments act in a ministerial and not in a judicial capacity; therefore no presumption can arise in favor of the regularity or legality of their assessments. Mut. Aid Soc. v. Helburn (Ky.), 2 S. W. 495.

[2] Columbia F. Ins. Co. v. Kinyon, 37 N. J. L. 33; Underwood v. Ia. Leg. of Hon., 66 Ia. 134; 23 N. W. 300; Agnew v. A. O. U. W., 17 Mo. App. 254; Conductors' Ass'n v. Birnbaum (Pa.), 10 Cent. Rep. 63; 11 Atl. Rep. 378; Am. Mut. Aid Soc. v. Helburn, 8 Ky. L. Rep. 627; 2 S. W. 495. If such laws require assessments upon members to be by classes, an assessment ignoring the classes is invalid. Atl., etc., Ins. Co. v. Moody, 74 Me. 385. The assessment must show clearly facts enabling the member to see the necessity for it. Lycoming Ins. Co. v. Bixbee, 15 W. N. C. 109. An assessment cannot be made for antic-

assessment must be made by the duly constituted and authorized body.[1] But where the directors have determined upon the necessity for an assessment and its amount is a mere matter of calculation, it is held they may empower the secretary or president to make the calculation and issue the call.[2] But the superior governing body in a benefit society incorporated under the laws of one state cannot compel its members to pay assessments levied by order of a supreme lodge incorporated under the laws of another state.[3]

§ 365. **Fees and dues.**—There are important differences between assessments and dues. The former are usually uncertain and contingent, and are generally incident to the property interests of members, graded, ascertained and measured according to the extent of that interest, whether it be represented by shares of stock, or a fund to become due and payable to the member from an association at a future period. It is

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ipated losses unless the laws of the society authorize it, but allowance may be made for expenses and non-payments. Rosenberger v. Wash. Mut. F. Ins. Co., 87 Pa. St. 287; Crossman v. Mass. Mut. Ben. Ass'n, 143 Mass. 435; 9 N. E. 753; Susquehanna Mut. F. Ins. Co. v. Gackenback, 19 W. N. C. 287. The exact sum must be stated. Where the by-laws provided that the directors should fix the amount, it was held they could not order that a sum "not exceeding" a certain amount be called. Monmouth Mut. F. Ins. Co. v. Lowell, 59 Me. 504. Where there are plain provisions on the subject in the charter or by-laws, these cannot be disregarded, although there may be a fairer and more equitable rule, Slater Mut. F. Ins. Co. v. Barstow, 8 R. I. 343, or a custom to make it in a different manner, the member not being shown to have had notice of such custom. Underwood v. Ia. Leg. of Hon., 66 Ia. 134.

[1] Bates v. Detroit Mut. Ben. Ass'n, 51 Mich. 587; 17 N. W. 67; Agnew v. A. O. U. W., 17 Mo. App. 254; Susquehanna Mut. Ins. Co. v. Tunkhannock Toy Co., 97 Pa. St. 424; Farmers' Mut. F. Ins. Co. v. Chase, 56 N. H. 341; Baker v. Citizens' Mut. F. Ins. Co., 51 Mich. 243; 16 N. W. 391. In Agnew v. A. O. U. W., 17 Mo. App. 254, the assessment was required by the rules of the order to be made by the subordinate lodge, and it was held that a member was not obliged to pay an assessment levied by the grand lodge.

[2] Passenger, Conductors, etc., Ins. Co. v. Birnbaum (Pa.), 10 Cent. Rep. 63; 11 Atl. Rep. 378.

[3] Bacon, Ben. Soc. L. Ins., sec. 377; Lampheare v. A. O. U. W., 47 Mich. 429; 11 N. W. 268.

otherwise with the obligation to pay dues, which is a feature of but few capital stock corporations. They are usually provided for in the constitution or by-laws of almost every corporation and voluntary association not having a capital stock divided into shares. The benefits received as a consideration for dues are purely personal to the member, and are not capable of assignment or pecuniary computation ; while the consideration for assessments is a property interest in the property and funds of the corporation. In mutual benefit societies assessments are laid upon members to meet sick and death benefits and losses by accident, fire, etc., while dues are required to be paid periodically, to meet the ordinary current expenses of governing and co-ordinate bodies in the organization; and a membership or initiatory fee must usually be paid at the time of becoming a member. The times and manner of paying dues are fixed in the laws of the society. They generally provide that such dues shall be paid at certain times without notice, and when so provided no action by the lodge or society or its officers is required to make them due and payable, as such provisions are part of the contract of membership ; but unless so provided, dues are not payable in advance, and members are not in arrears until the expiration of the term for which they are payable.

§ 366. Liability of members of voluntary associations.—

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[1] Where the by-laws provided that a member should not be in good standing who was more than six months in arrears, the six months was held to begin to run from the day after the last day of the term for which the dues were to be paid. Wiggin v. Knights, etc., 31 F. 122, the court saying :—" Each lodge has the power to regulate that matter for itself, may make the dues payable in advance, or at the end of the period for which they are leviable; but the pay-day does not come until the time fixed for it, and they cannot, in the nature of the words used to impose the forfeit insisted upon, be in arrears until that day is past, whatever day it may be." See also Watson v. Jones, 13 Wall. 679; McMurray v. Supreme Lodge K. of H., 20 Fed. Rep. 107.

The power of the officers of voluntary associations to assess the members rests upon an implied agency; and, as in the case of incorporated mutual benefit societies, the liability to pay assessments continues during the membership only.

Unless provided otherwise in the articles of association, the member may withdraw at any time. But he cannot, by so doing, relieve himself from his proportion of indebtedness incurred, during his connection. Courts have always distinguished between the rights growing out of the internal relations of members to each other and to the association, and those between creditors and the association and its members. With reference to the former, the relations of the parties are considered very similar to those existing between the members of a corporation; but with reference to the claims of creditors, their liabilities do not vary materially from those of the members of a copartnership.[1]

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[1] Ebbinghousen v. Worth Club, 4 Abb. N. C. 300; Ferris v. Thaw, 5 Mo. App. 279; affirmed 72 Mo. 446. In the last case the court say:—"Certain societies, as clubs which are not constituted for any purpose of profit, are exposed to liabilities similar in many respects to those of a partnership. All parties who take an active part in working out a project, who attend meetings at which resolutions are made or orders given for the supply of goods, in furtherance of a joint undertaking, are, in general, jointly responsible. The act of a secretary of a voluntary association will not bind the board, if not authorized; but it will bind any members who were present at a meeting, and concurred in giving authority to the secretary. Where members of a voluntary association authorize its officers to engage in a particular transaction in the name of the society, as a body, or give to persons interested a tangible third party against whom they can proceed, they are themselves the only persons that can be sued, and are, in fact, principals in the transaction." * * * "It is not necessary to invoke the doctrine of partnership, perhaps; yet as to this particular transaction these men became partners, though not partners in trade, and however distinct as to other matters. And if they choose to assume a common name, under that name, they will, each and every one, be liable as if the name signed to the note was the individual name of each man; and if they employ an agent's hand to write that name, it is as if each man himself had held the pen." See also Heath v. Goslin, 80 Mo. 310; Cullen v. Duke of Queensbury, 1 Brown Ch. 101; Newell v. Borden, 128 Mass. 31; Lewis v. Tilton, 64 Ia. 220; 19 N. W. 911; s. c. 52 Am. Rep. 436; Ray v. Powell, 134 Mass. 22; Doubleday v. Muskett, 7 Bing.

In order to render members of an unincorporated association personally liable in any degree to creditors on the ground of the agency of the party contracting in their name, the agency must be established by evidence. None is implied from the mere fact of association.[1]

§ 367. **Voluntary withdrawal.**—What constitutes a withdrawal or abandonment of membership must be determined in each case in view of the character of the association and the terms of the constating instruments and contracts of membership. The fact that officers and members of an unincorporated association, as individuals, unite with an association of a similar character, does not vacate their offices, or forfeit their membership in the former association, in the absence of any provision in its constitution forbidding them to unite with the second association; and the fact that the constitution or rules of the second association forbids its members to become or continue members of any other local organization does not affect their relation to the first association.[2]

§ 368. **Effect of withdrawal.**—Withdrawal from non-

110; Blakeley v. Bennecke, 59 Mo. 193; Horsely v. Bell, 1 Brown Ch. 101. The same principle has been applied to render liable the members of a campaign club. Richmond v. Judy, 6 Mo. App. 467, where the court said :—"If the work was done with the previous concurrence or subsequent approbation of defendants, they and all the members of the club who stood in the same situation were liable to pay for the goods if the credit was given to the members of the club. * * * * If the plaintiff had trusted solely to the state of the funds, and this had been shown, the members of the committee could not have been liable unless the funds were collected; but if the credit was given to the members of the committee, such members as were aware of the dealing and authorized or sanctioned it are undoubtedly liable."

[1] Bailey v. Macauley, 19 L. J. Q. B. 73; Sizer v. Daniels, 66 Barb. 426; Flemyng v. Hector, 2 M. & W. 172; Wood v. Finch, 2 Fost. & Fin. 447; Delauney v. Strickland, 2 Stark. 416; Luckombe v. Ashton, 2 Fost. & Fin. 707.

[2] Farrell v. Cook, 5 N. Y. S. 727; Farrell v. Dalzell, 5 N. Y. S. 729; Mayer v. Am. Star Order, 2 N. Y. S. 492.

capital stock societies, whether incorporated or unincorporated, effects an abandonment of property rights therein.[1]

And this is equally the case where a number secede in a body as where a single member withdraws.[2]

It was held that this rule applied even where the seceding body constituted a majority of the membership.[3]

In such cases the members adhering to the tenets or principles of the order or society and to the original organization are entitled to continue in the use and enjoyment of the property.[4]

The reason of this rule is that the original association holds the property in trust, especially if its objects be charitable in character, as in case of a church; and equity will assist the adherents to prevent a diversion of the trust fund.[5]

§ 369. **Membership in boards of trade, clubs, etc.**—The rights, privileges and duties pertaining to membership in the great number and variety of social and business and political organizations, and unions not having capital stock are to be sought for in the statutes under which they are formed, if incorporated, and in all cases in the articles of association and by-laws. The general principles previously discussed in this chapter will be found applicable, with slight modifications to fit peculiar features.

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1 Altman v. Benz, 27 N. J. Eq. 331; Smith v. Smith, 3 Desaus, 557; Isham v. Trustees of First Presbyterian Church of Dunkirk, 63 How. Pr. 465.

2 Brown v. Monroe, 80 Ky. 443.

3 Gaff v. Greer, 8 Ind. 122.

4 Isham v. Trustees of First Presbyterian Church of Dunkirk, 63 How. Pr. 465; Holt v. Downs, 58 N. H. 170, 181.

5 Christ Church v. Holy Communion Church, 14 Phila. 61. In Landis' Appeal, 102 Pa. St. 467, it was held that the fact that the seceding members had been permitted for thirty years to use the church building for meetings would not entitle the latter to interfere to prevent a demolition of the old and the erection of a new and larger one.

CHAPTER XV.

CONTROL THROUGH CORPORATE MEETINGS.

§ **370. Objects and powers of corporate meetings.**—The members of a corporation in meeting assembled are not the corporation; and yet, as its directing, and governing agent, they are limited in power over it only by the charter and general law. The usual business transacted relates to matters of fundamental and vital interest to the continuity of the organization and the successful prosecution of the main enterprise for

which it was formed, such as the election of directors, increasing or diminishing capital stock, enactment, repeal and amendment of by-laws, amendment of charter or articles, dissolution and other acts intended to shape the general policy and destiny of the corporation.

As long as no mandatory provision of law, the charter or by-laws, is violated, the members may conduct a corporate meeting in any manner convenient and agreeable to themselves. No particular formalities are required, and mere irregularities are unimportant provided the sense of the meeting is fairly expressed.[1] In order to be of any avail to members present, they must object to and enter protest against irregularities at the meeting, if aware of their occurrence.[2]

§ **371. Control of the majority.**—It is an implied condition in every contract of membership in corporations organized for profit that a majority in point of interest, and in point of numbers in other corporations, shall control its operations and funds.[3] Each member is bound by the acts and proceedings sanctioned by a majority duly given according to law in the exercise of

[1] Phillips v. Wickham, 1 Paige, 590; Dowing v. Potts, 23 N. J. L. 66. No formality in putting a question before the members is required. The president may put a question to be voted upon of his own mere volition. In re Horlury, etc., Co., L. R. 11 Ch. D. 109. See also Hughes v. Parker, 20 N. H. 58; People v. Peck, 11 Wend. 604; Matter of Wheeler, 2 Abb. Pr. (N. S.) 361; Hardenburgh v. Farmers', etc., Bank, 3 N. J. Eq. 68; Gorham v. Campbell, 2 Cal. 135. What was said and done at meeting of members of an old corporation assembled to form a new one is admissible in evidence to show an understanding among all the parties as to whether the new company should assume the debts of the old. Fort Worth Pub. Co. v. Hettson (Tex.), 16 S. W. 551 (Aug., 1891).

[2] In re Mohawk, etc., R. R., 19 Wend. 135; State v. Lehre, 7 Rich. Law, 234, 325; The King v. Trevenen, 2 Barn. & Ald. 339.

[3] Hancock v. Holbrook, 40 La. Ann. 53; 3 So. 351; Barry v. Broach, 65 Miss. 450; 4 So. 117; Everson v. Eddy, 12 N. Y. S. 872; Dudley v. Kentucky High School, 9 Bush. 578. The agreement of a majority, however large in interest, elsewhere than in a corporate meeting does not bind the corporation. American, etc., Co. v. Norris, 43 F. 711.

the powers conferred by statute and constating instruments.[1] This rule has been frequently applied in cases of elections of corporate officers.[2] And it is not necessary to the election of an officer that he receive a majority of the votes of all the stockholders, but a majority of those cast will be sufficient.[3]

But the rule is subject to the limitation that no majority, however large, can misapply the funds or divert the operations of the corporation, aside from or beyond the chartered purposes or agreements of association or in total disregard of the formalities prescribed by law or the articles, so as to bind a dissenting minority.

§ 372. **Majority control implied in contract of membership.**—A stockholder on becoming a member of a corporation thereby impliedly surrenders to it the right to manage and control the corporate property and affairs in accordance with the terms express or implied of the corporate charter.[4] Flowing from this implied obli-

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[1] City of Covington v. Bridge Co., 10 Bush. 69, 76; E. Tenn. etc., R. R. Co. v. Gammon, 5 Sneed. 567; McBride v. Porter, 17 Ia. 203; Faulds v. Yates, 57 Ill. 416; Leo v. Un. Pac. R. R. Co., 19 Fed. Rep. 283; Barnes v. Brown, 80 N. Y. 527; Dudley v. Ky. High School, 9 Bush, 578; Livingston v. Lynch, 4 Johns. Ch. 573. See also, Meeker v. Winthrop Iron Co., 17 Fed. Rep. 48; s. c. 109 U. S. 180; Gifford v. New Jersey R. R. Co., 10 N. J. Eq. 174; Durfee v. Old Colony, etc., R. R. Co., 5 Allen, 242; Treadwell v. Salisbury Mfg. Co., 7 Gray, 393; New Orleans, etc., R. R. Co. v. Harris, 27 Miss. 537; Stevens v. South Devon Ry. Co., 9 Hare, 313. If action taken at a meeting be irregular, a member may be bound by subsequent ratification by a majority at a meeting which he attends. Barry v. Broach, 65 Miss. 450. Where it does not appear by the minutes of a meeting at which an assessment was levied, that a majority were present, it was held that the assessment was invalid. Mayberry v. Mead, 80 Me. 27; 12 A. 635. See also Ellsworth Woolen Mfg. Co. v. Faunce, 79 Me. 440; 10 A. 250. The majority may proportion the votes to the number of shares held by members. Com. v. Detwiler, 131; Pa. St. 614; 18 A. 990; Robinson v. Hemmingway, Id.

[2] People v. Albany, etc., R. R. Co., 55 Barb. 344; E. Tenn., etc., R. R. Co. v. Gammon, 5 Sneed. 567; Dudley v. Ky. High School, 9 Bush. 576; Gifford v. N. J., etc., R. R. Co., 10 N. J. Eq. 171; N. O., etc., R. R. Co. v. Harris, 27 Miss. 517, 537; Treadwell v. Salisbury Mfg. Co., 7 Gray, 393.

[3] Appeal of Gowen, 10 W'kly N. C. (Pa.) 84; State v. Green, 37 O. St. 227.

[4] Meeker v. Winthrop Iron Co., 17 Fed. Rep.

gation is the authority and right of the majority to bind the whole body as to all transactions within the scope of the corporate powers.[1]

§ **373. Power of majority to dissolve.**—And if the charter or general law authorize it, the majority may, when their action is free from fraud, dissolve the corporation,[2] or consolidate with another corporation without the consent of the minority.[3] It is only when the entire collective interest is ignored or disregarded, or when the majority, or the agents they have selected, pervert the corporate machinery to their individual interests, or to purposes and objects other than those for which the corporation was formed, that the minority have a right to complain or have any right to appeal to the courts. Even then, courts of law seldom furnish them an adequate remedy. Courts of equity are, in such cases, essentially the minority stockholders' stronghold.[4]

The majority have no right to dissolve the corporation, except in the manner and subject to the conditions provided by statute. "When a method of procedure is prescribed by which a corporation may be dissolved, that method must be followed."[5] But if the corporation is an unprofitable and failing enterprise,

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1 Ervin v. Oregon R. Co., 20 Fed. Rep. 577; N. R. R. Co. v. Harris, 27 Miss. 537; Dudley v. Ky. High School, 9 Bush. 578.

2 Ervin v. Oregon R. Co., supra. Infra, § 427.

3 Atchison, etc., R. R. Co. v. Commrs., 25 Kan. 261.

4 Hawes v. Oakland, 104 U. S. 450. Infra, § 611.

5 Kohl v. Lillienthal, 81 Cal. 378, per Fox, J., 22 P. 689; 20 P. 401. It was held that a resolution by vote of two-thirds of the shareholders of a national bank to go into liquidation and close, certified to the comptroller of the currency, does not dissolve the corporation, nor affect its capacity to collect its assets and close its affairs. Merchants' Nat. B'k v. Gaslin, 41 Minn. 552; 43 N. W. 483. But, after the expiration of the term of its charter, the stock of such an association is not transferable, so as to give the transferee the right to share in the election of directors and such transferee not being a stockholder, is ineligible as a director, under Rev. St. U. S., sec. 5145. Richards v. Attleborough Nat. B'k, 148 Mass. 187; 19 N. E. 363.

then it seems they may make a sale of all the corporate property *with a view* to dissolution.[1]

§ **374. What constitutes majority.**—It is not necessary in order that the acts done and resolutions passed at a corporate meeting may be binding that all, or, in the absence of a provision to the contrary, even a majority of the members attended and voted on the proposition. The charter or articles or by-laws usually specify the number necessary to constitute a quorum for the transaction of business. In the absence of any such provision, such of the members as actually assemble at a properly called and convened meeting constitute a quorum for the transaction of business, and a majority of that quorum have authority to represent the corporation.[2] The number necessary to constitute a

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[1] Lauman v. Lebanon Valley R. R. Co., 30 Pa. St. 42; Holmes, etc., Manuf'g Co. v. Holmes, etc., Metal Co. (N. Y.), 27 N. E. 831. (Aug., 1891); Hancock v. Holbrook, 40 La. Ann. 53; 3 So. 35; Trisconi v. Winship, (La.) 9 So. 29. An agricultural society, incorporated under Laws N. Y. 1855, c. 425, for the formation of such societies, but not as stock companies, or with any capital stock, was afterwards, under a special act passed for the purpose, organized into a stock company. Held, that a requirement in the general act of an application to the court for authority to sell land of such a society, was superseded as to the society by a provision of the special act that its officers, by a vote of holders of two-thirds of the stock, might sell and dispose of the property of the society; and that a mortgage of its real property, duly executed by the officers pursuant to such a vote, was valid. Preston v. Loughran, 12 N. Y. S. 313. The consent of all the stockholders of a savings bank need not be first obtained to the bank's assignment for benefit of creditors, if such assignment is made in good faith. Decombes v. Wood, 91 Mo. 96; 4 S. W. 82. But any shareholder may bring an action to set aside an assignment for the benefit of creditors made by the directors of an insolvent bank as *ultra vires*. But such action properly purports to be brought on behalf of plaintiff and others similarly situated, without stating who they are, or how numerous, or whether they constitute a majority of the stockholders or otherwise. Id.

[2] Craig v. First Presby. Church, 88 Pa. St. 42; Field v. Field, 9 Wend. 395; Madison Ave. Baptist Church v. Baptist Church, etc., 5 Rob. 649; Everett v. Smith, 22 Minn. 53. The by-laws of a corporation provided that "the capital stock of the company shall be $10,000, divided into 400 shares of $25 each," and that "no business shall be transacted at any meeting of the stockholders, unless a majority of the stock is represented, except to organize the meeting, and adjourn to some future time." Held, that, although only 243 shares had been

quorum for certain purposes is frequently prescribed by statute.[1]

Of those assembled, it is not necessary that all shall vote. A majority of those actually voting can elect officers, as in state and county elections.[2]

All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares.[3]

§ 375. A different rule applies to directors' meetings.— In this matter there is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constitutional members. In the latter case a majority of those who appear may act, but in the former a majority of the definite body must be present and then a majority of the quorum may decide. This is the general rule on the subject, and if any corpora-

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subscribed for, it required 201 shares to constitute a majority, and that an election of directors at a meeting, where less than that number was represented was illegal. Ellsworth Woolen Manuf'g Co. v. Faunce, 79 Me. 440; 10 A. 250.

1 The California corporation act makes the following provision in regard to the number necessary to constitute a corporate meeting in corporations for profit for the purpose of electing officers and transacting business:

"At all elections or votes had for any purpose, there must be a majority of the subscribed capital stock or of the members represented either in person or by proxy in writing. . . . . . Any regular or called meeting of the stockholders or members may adjourn from day to day or from time to time, if, for any reason, there is not present a majority of the subscribed stock or members, or no election had, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors." Civ. Code, sec. 312. Incorporated associations other than for profit are given absolute control over the matter.

They may make by-laws providing "the number of members that shall constitute a quorum at any meeting of the corporation and that election of officers of the corporation by a meeting so constituted shall be as valid as if there had been a majority of the members present thereat and voting." Civ. Code, sec. 599.

2 Columbia Co. Lever Co. v. Meir, 39 Mo. 53.

3 County of Cass v. Johnston, 95 U. S. 360, 369.

tion has a different modification of the binding will of the corporation, it arises from the special provisions of the charter or aticles of incorporation.[1]

§ **376. Voting rights of the members.**—The apportionment of voting strength according to the number of shares of stock held by each member is purely a statutory invention founded on fairness and equality, but has become a custom so well established, that an intention to follow it is implied in the absence of any indication or direction to the contrary in the charter or articles. At common law, no member could cast more than one vote whether he held one share or a great many.[2]

There is no right of cumulative voting at elections for boards of directors, in the absence of express statutory or charter authority, without which, each shareholder can cast but one vote on each share for each director to be elected, whether he votes for one or all of them.[3]

§ **377. Interest no disqualification for voting.**—The rule that agents for a corporation shall not exercise its

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[1] 2 Kent's Com. 293.

[2] Taylor v. Griswold, 14 N. J. Law, 222, 237; Commonwealth v. Conover, 10 Phil. 55. In Chollar Min. Co. v. Wilson, 66 Cal. 374; 5 P. 670, the words "majority of shareholders" as used in an act of March 21, 1872, were construed to mean a majority of the persons holding shares, and not the holders of a majority of the stock.

[3] Const. W. Va. 1872, art. 4, § 11, and Code W. Va., c. 54, §§ 56, 67, enacted pursuant thereto, provide that every stockholder in a corporation shall have the right to vote for the number of shares of stock owned by him for as many directors as are to be elected, or to cumulate his shares, and give all his votes to one director or divide them among several. The charter of defendant railroad company, granted before the adoption of this constitution allowed each stockholder one vote for each share of stock. *Held*, that the provision for cumulative voting binds defendant, where in its charter the right to alter and amend it was expressly reserved. Cross v. West Virginia Cent. & P. Ry. Co. (W. Va.), 12 S. E. 1071. See Detwiler v. Com., 131 Pa. St. 614.

authority in their own interest, at the expense of the membership, has no application to them, when assembled in a corporate meeting for the purpose of voting, unless they corruptly sacrifice the interest of the corporation for their own gain.[1] As long as they act in good faith and with due diligence, members may elect themselves officers and constitute themselves

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[1] Woodruff v. Dubuque & S. C. R. Co., 30 F. 91. A person who has been induced to become a stockholder in a corporation by the assurance of a stockholder that the company would not engage in a particular business, does not thereby acquire the right to enjoin such stockholder from voting in favor of a proposition that the corporation engage in such business. Whether the corporation will run the risk of such litigation is a matter for the majority. Converse v. Hood, 149 Mass. 471; 21 N. E. 878. A mortgage, given by a corporation is not invalidated by the fact that the resolution therefor was adopted by the votes of persons owning the indebtedness intended to be secured, where it appears that such indebtedness was a valid and binding one, the greater part of it being already secured by mortgages and that the rates of interest was reduced. Rittenhouse v. Winch, 57 Hun, 587; 11 N. Y. S. 122. Under the National Bank Act stockholders in National banks owing balances on their shares are disqualified from voting at elections for directors. Rev. St. U. S., sec. 5154; United States v. Barry, 36 F. 246.

Where a shareholder in a water company, at his own expense, and for his own benefit, has built a system of pipes, etc., etc., suitable for an extension of the company's plant, he has a right to sell the same to the company; and the fact that at a meeting of the shareholders he voted his shares in favor of the purchase does not make the transaction a fraud upon the minority shareholders, who were opposed thereto, and they cannot enjoin the issuance of the company's stock and bonds in payment therefor, without showing actual fraud, or that the price paid was so exorbitant as to necessarily lead to the inference of fraud. Reversing, 5 N. Y. S. 124; Gamble v. Queen's County Water Co. (N. Y.), 25 N. E. 201.

Where a railroad company, which owns a majority of the stock of another, procures the latter to issue bonds to it, furnishing a sufficient consideration therefor, and using no improper means to procure the issue, it is immaterial to the validity of the transaction that the former procured and used such bonds as security to float a loan made for its own exclusive benefit. Gloninger v. Pittsburgh & C. R. Co. (Pa.), 21 A. 211. A provision in the charter of a corporation that no stockholder shall "cast more than one-fourth of all the votes at any election of directors," means one-fourth of all the votes the shares of stock authorize to be cast, and this restriction cannot be evaded by the gratuitous transfer by the stockholder of his stock to others, in order that they might vote it in his interest. Mack v. De Bardeleben C. & L. Co. (Ala.), 8 So. 150.

agents of the corporation, and thus control its business and funds. But there is a point of abuse, at which courts will interfere, even with the privilege of voting. If the majority attempt to appropriate the corporate funds to their own use, or to direct the business to objects not contemplated in the charter or incidental to its lawful objects, courts will administer preventive relief at the suit of an aggrieved shareholder.[1]

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[1] Goodwin v. Cin., etc., Canal Co., 18 O. St. 169: Menier v. Hooper's Tel. Wks., L. R. 9 Ch. 350; Graves v. Mono Lake, etc., Min. Co., 81 Cal. 303; 22 P. 665; Wright v. Oroville Min. Co., 40 Cal. 20, 27; Memphis, etc., R. Co. v. Wood, 88 Ala. 630; 7 So. 108; Erwin v. Or., etc., Ry. Co., 20 Fed. Rep. 577; Barr v. New York, etc., R. R. Co., 96 N. Y. 444; Riley v. Oglebay, 25 W. Va. 36; State v. Concord R. R. Co., 13 Am. & Eng. R. R. Cas. 94, 107. In Zeigler v. Hoagland, 52 Hun, 385, it appeared that the plaintiff owned less than one-half of the stock in a corporation; that for many years he was one of the three trustees constituting the board, but the defendants, who were all of one family, elected themselves trustees and president, secretary and treasurer. After an unsuccessful attempt to buy plaintiff's stock, the defendants threatened to raise and did raise their salaries from time to time until they amounted to $50,000, $30,000 and $6,000. It was held that their action was a gross fraud upon the minority stockholders, and equity would restrain the payment of more than the real value of the officers' salaries.

Complainants, as executors and trustees, held certain shares of stock in an incorporated company. Defendants held certain other shares therein, which added to those held by complainants constituted a majority of all the shares. Complainants on the one part, and defendants on the other, entered into a contract by which complainants agreed to execute, and in pursuance thereof did execute, a proxy, irrevocable for five years, to defendants, to vote at all stockholders' meetings upon the complainants' shares; and defendants, in consideration thereof, agreed to so vote said shares as that one of the complainants should be continuously employed as manager of the corporation, at a salary of $2,500 a year. It was held: (1) The agreement is void, first, because against public policy; and, second, because a breach of trust by complainants. (2) That complainants are entitled to relief against the defendants, and an injunction against the use of the proxy, notwithstanding their position *in pari delicto* with defendants. Cone's. Ex'rs v. Russell (N. J.), 21 A. 847. See also Butts v. Wood, 37 N. Y. 317; Ogden v. Murray, 39 Id. 202. In Colton v. Stanford, 82 Cal. 351; 23 P. 16, it was held that a business relation between several persons associating together for the purpose of organizing, controlling, and operating corporate enterprises, held a fiduciary relation to each other subject to the ordinary rules governing trust relations, especially where they are shown to have reposed great confidence in each other in respect to the

Unless, however, a clear and dangerous abuse of this nature is shown, it has been held that, for reasons of convenience amounting to practical necessity, shareholders will not be prevented from voting at a general meeting of the company on account of individual interests in the result, though the interest be based on an illegal consideration.[1]

A combination among shareholders made in good faith to accomplish an object believed to be beneficial to the interests of the corporation would not be illegal.[2] But if the agreement of a shareholder to sell his vote was made to obtain an advantage to himself, it is an agreement to misuse a power held in trust and will be condemned by the courts. At any rate a court of equity will not lend its aid to enforce specific performance of a contract for the purchase of stock intended to be used in getting control of a corporation.[3]

§ 378. **Stock books as evidence of the right.**—The general rule governing the right to vote at corporate meetings is that the stock or membership book furnishes the *prima facie* evidence, and that the corporation cannot be required to decide the question otherwise, that being one of the objects of keeping a stock book on which transfers of membership are required to be recorded.[4]

But this rule has received so many modifications in

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business. See also, Meeker v. Winthrop Iron Co., 17 Fed. Rep. 48; Ervin v. Oregon Ry. & Nav. Co., 27 Fed. Rep. 625.

1 East P. D., etc., Min. Co. v. Merriweather, 2 H. & M. 254.

2 Faulds v. Yates, 57 Ill. 416; Moffatt v. Farquharson, 3 Bro. C. C. 338; Bolton v. Madden, Y. R. 9 Q. B. 55; Elliott v. Richardson, L. R. 5 C. P. 744; Card v. Hope, 2 B. & C. 661.

3 Falls' App., 91 Pa. St. 434; Fisher v. Bush, 35 Hun, 641.

4 Mousseaux v. Urquhart, 19 La. Ann. 482; Evans v. Bailey, 66 Cal. 112; 4 P. 1089. See Bank of Utica v. Smalley, 2 Cowen, 770, 778; People v. Robinson, 64 Cal. 373; 1 P. 156; Fisher v. Essex B'k, 5 Gray, 373, 380; Johnston v. Jones, 33 N. J. Eq. 216; State v. Pettinelli, 10 Nev. 141; Beecher v. Wells Flouring Mill Co., 1 McCrary, 62.

endeavors to avoid the hardship and injustice of particular cases that many states have found it necessary to regulate the matter by definite statutory provisions.[1]

§ 379. **Meaning of legal owner.**—The meaning of the words, "must be a member thereof or a *bona fide* stockholder having stock in his own name," etc., found in a statute, was held not to be satisfied if the idea of ownership was modified or contradicted by the fiduciary designation.[2]

It is the object of statutory regulations to afford corporations a convenient test of the right to vote in cases of dispute between persons claiming ownership of its stock; and they are not bound to stop or delay proceedings in order to investigate the equitable rights between pledgors and pledgees and trustees and *cestuis que trust.*[3]

The object of the stock book, and of requiring transfers of stock to be recorded by the corporation, is for

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[1] An important relaxation of the rule is that generally made by statute in favor of administrators, executors, guardians and other trustees. See In re Cape May & D. B. N. Co. (N. J.), 16 A. 191. In Stewart v. Mahoney Min. Co., 54 Cal. 149, it was decided that one in whose name shares stand on the books with the designation of "trustee" cannot vote them if he has no actual interest in them, and is not in fact, a shareholder.

[2] The law as to the important use to be made of the stock books by the corporation, in determining the right to vote, was thus summarized by SHARPSTEIN, J., in People v. Robinson, 64 Cal. 373, 375: "A transfer not entered on the books of the company has no validity outside of the parties to such transfer. If not, could it affect the validity of an election at which trustees of the company were elected? If so, would not a transfer, although not entered on the books of the company, be valid outside of the parties to such transfer? The construction which we feel compelled to give to this clause is, that a transfer of stock, until entered on the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. Until that is done, or demanded to be done, the person in whose name the stock is entered on the books of the company is, as between himself and the company, the owner to all intents and purposes, and particularly for the purpose of an election."

[3] Hoppin v. Bufferin, 9 R. I. 513.

the protection of the corporation, to enable it to know who are its members, who are entitled to dividends, and to enable it to know who are entitled to vote. This is the recognized object of such provision as decided in many cases.[1]

§ 380. **Stock held in trust.**—The rule does not prevent him having the legal title in a representative capacity from voting. In case of the death of a stockholder, his administrator becomes, by operation of law, vested with the legal title to the stock, and is entitled to vote it, at all elections, without a transfer upon the stock book. The same rule would apply to all cases where the title is transferred by operation of law. And the fact that the decedent held the stock subject to a trust would not alter it. Upon the death of a trustee of personal property the trust would devolve upon his representative and he become legal owner as to all persons except the *cestui que trust*, and the corporation has nothing to do with the equities between the immediate parties to the trust, or between the legal owner and third parties, as regards the rights of voting.[2] So if the stock be hypothecated the pledgor is entitled to vote as long as the stock remains in his name on the books of the corporation,[3] or in the name of the pledgor,

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[1] People v. Robinson, 64 Cal. 373; Hoppin v. Bufferin, 9 R. I. 513; Gilbert v. Mfg. Iron Co., 11 Wend. 627; Bank of Utica v. Smalley, 2 Cow. 770, 778; Detwiler v. Com., 131 Pa. St. 614; Miller v. Ratterman (Ohio), 24 N. E. 496; Kirtright v. Bank of Buffalo, 22 Wend. 348, 362; Fisher v. Essex Bank, 5 Gray, 373, 380; State v. Smith, 15 Or. 98; 15 P. 386; Hoagland v. Bell, 36 Barb. 57.

[2] In re Cape May, etc., Co. (N. J.), 16 Atl. Rep. 191; In re Ferry Co., 63 Barb. 556; In re L. I. R. R. Co. Elec. Case, 19 Wend. 43; In re Northern, etc., Co., 13 Beav. 139.

[3] Wilcocks, ex parte, 7 Cow. 402. See McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274. In California, by statute, the share of stock of a minor or insane person may be represented and voted by his guardian, and of a decedent by his administrator or executor. Civ. Code, sec. 313. Though the pledgee of stock transferred to him on the corporate books may have promised that the pledgee should retain control of the corporation, this equity must be enforced in a suit

with an explanation on the register showing the extent and nature of his title.[1]

One whose name appeared on the company's books as the owner of shares was held not to have lost his right to vote them by reason of an assignment in bankruptcy.[2]

But it seems that the *prima facie* title of the record owner may be disputed and overcome so as to compel the corporation to recognize the real owner, if the latter is present objecting, and is able to show his title beyond dispute.[3]

§ **381. Collusive transfers.**—If shares were collusively and fraudulently transferred on the stock book without the knowledge or consent of the real owner, he would, no doubt, have the right to make that fact appear either at the meeting where one, having thus obtained a mere colorable title, attempted to vote them to defeat the attempt, or in a proceeding to set aside an election or other act done at such meeting, unless a majority of the stock, independent of such shares, had been fairly represented and voted on the proposition.

As between the record owner and real or equitable owner, a court of equity will often interfere to preserve to the latter the right of voting, and prevent an unjust exercise of it by compelling the nominal owner to give

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to compel the pledgee to give him a proxy, and not in a proceeding under Comp. Laws N. D., § 2932, providing that, on the application of any person aggrieved by any election held by a corporate body, the district judge shall summarily hear the allegations and proofs, and thereupon confirm the election, order a new one, or direct such other relief as may be right and just. In re Argus Printing Co. (N. D.), 48 N. W. 347.

1 Infra, § § 471, 498.

2 State v. Ferris, 42 Conn. 560. See Re North Shore, etc., Ferry Co., 63 Barb. 556.

3 Allen v. Hill, 16 Cal. 113. There are several New York cases to the contrary, but they are predicated upon a statute making the books the only evidence of ownership. Holmes, ex parte, 5 Cow. 434.

a proxy. As where a shareholder has made a complete sale or assignment of his interest in shares and no transfer has been made to the purchaser upon the books of the company,[1] or when stock has been transferred by the real owner to one as collateral security, only.[2]

§ 382. **Shares owned by corporation cannot be voted.**— The rule that the legal owner may vote the shares in his name is subject to an exception in the case of shares owned by the corporation. And the exception holds good, although the shares are held for the corporation in the name of trustees. This necessarily follows unless it can be shown that a corporation can become a stockholder of its own stock, receive from itself dividends, respond to calls for assessments, and be responsible for debts, first as a corporation, and second as a stockholder.[3]

In Holmes, *ex parte*,[4] thirteen persons, being duly elected directors, had received votes upon stock owned by the corporation, and thirteen other persons had received a majority of the votes representing outstanding stock. The court vacated the election of the former, and declared the others duly elected.

The principle upon which these decisions rest is, that officers of moneyed institutions will not be allowed to wield such stock, however obtained, to control elections of directors and perpetuate themselves and their favorites in office.[5]

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1 McHenry v. Jewett, 26 Hun, 453.

2 Vowell v. Thompson, 3 Cranch C. C. 428.

3 Mousseaux v. Urquhart, 19 La. Ann. 482; Brewster v. Hartley, 37 Cal. 15; Vail v. Hamilton, 85 N. Y. 453; 20 Hun, 355; Am. Ry. Frog Co. v. Haven, 101 Mass. 398. Where one held stock which had been transferred to him "for the benefit of the corporation," it was held that until the corporation had, by authority of the company, sold and transferred the shares, the right of voting upon them was suspended. Brewster v. Hartley, supra.

4 15 Cow. 426.

5 In Brewster v. Hartley, supra, shares of stock in a railroad corporation had

§ **383. Of the place of meeting.**—No meeting of members of a corporation can be legally held outside of the boundaries of the state by or under whose laws the corporation was created.[1] As to the legal effect of acts done at corporate meetings outside the state, there is a conflict of opinion as to whether they are void or merely voidable. It seems to be settled, by the weight of authority, that the corporation itself and the stockholders who attend such ultra-territorial meeting are estopped to deny its validity and regularity, and that as to others they are voidable but not void.[2] And a

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been transferred by the corporation to a trustee to secure a debt due by it. The trustee had voted all the shares so held, such votes having determined the result of an election for directors. In deciding against the title to office of the directors so elected, RHODES, J., delivering the opinion said:—"While the position that the corporation may issue its stock in payment of its indebtedness is not questioned, it does not follow that the stock may be issued in the usual manner, and afterwards become the property of the corporation, and be held in such a manner that it did not merge. When the certificates of stock are issued to a stockholder, they are, in his hands, the muniments and evidence of his title to a given share in the property, income and franchises of the corporation. The corporation possesses only the right, the power to issue the stock, and a condition precedent to the exercise of the power is the purchase and payment for the stock. This restriction, if it may properly be so called, is not more unreasonable than those relating to the amount of money the corporation may borrow and the rate of interest it may pay, and they all tend in some degree to protect the stockholders and creditors. If the power exists in the corporation to issue stock to secure a loan or indebtedness, it is practically unlimited, and the directors may issue and pledge all the capital stock not held by stockholders as security for a trifling loan, and by the aid of the stocks thus issued, they may increase the capital stock, and pledge the new stock to secure another loan, and thus perpetuate themselves in power beyond the reach of redress on the part of the stockholders, who may have contributed much the larger portion of the assets of the corporation." In the same case it was held that "where the qualifications of voters are prescribed by statute, and authority to regulate the conduct of elections in by-laws is also given, no by-law will be allowed to operate so as to take away or abridge the exercise of the right of voting. Such statutory provisions are imperative."

[1] Miller v. Ewer, 27 Me. 509; Smith v. Silver Valley Min. Co., 64 Md. 85; Franco Texas Land Co. v. Laighle, 59 Tex. 339; Omrsby v. Vermont Copper Min. Co., 56 N. Y. 623; Hilles v. Parrish, 14 N. J. Eq. 380; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Camp v. Byrne, 41 Mo. 525.

[2] Where all the stockholders are present at a meeting held outside the state, and vote for an increase of capital stock, and agree to receive proportionate shares of the increased stock, they cannot question the validity of the meeting

stockholder is estopped from objecting to a meeting of the board of directors on the ground that it was held outside the state of the company's incorporation, where it appears that he was present at the previous meetings, nearly all of which were held at the same place, and made no objection.[1] But where the corporation has been incorporated by the concurrent action of two or more states, it may lawfully hold meetings of the stockholders in either state.[2]

A different rule prevails in respect to meetings of directors, it being generally held that, in the absence of a statutory or charter provision to the contrary, they may lawfully hold meetings outside the state, and that

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in an action brought against them by creditors of the corporation to compel them to pay the par value of the stock as a trust fund for the creditors. Reversing 41 F. 531. Handley v. Stutz, 11 S. Ct. 530. In Aspinwall v. Ohio, etc., R. R. Co., 20 Ind. 492, 497, calls made at a meeting in another state to which a corporation after being formed had migrated were held void and unenforceable. In Miller v. Ewer, 27 Me. 509, an election of directors at a meeting held in a foreign state was held void. See also to same effect Freeman v. Machais, etc., Co., 38 Me. 343; Ormsby v. Vermont Copper Min. Co., 56 N. Y. 623. The proceedings at such meeting may be subsequently validated by legislative action where it could previously have authorized it. Graham v. Boston, H. & H. R. R. Co., 118 U. S. 161, 178. See Granada Co. v. Brogden, 112 U. S. 261. The corporation itself is estopped. Heath v. Silverthorn Lead Min. etc., Co., 39 Wis. 146. And so are the stockholders who participated in the transaction of the business and voted in favor of the measures adopted. Camp v. Bryne, 41 Mo. 525; Ohio, etc., R. R. Co. v. McPherson, 35 Mo. 13. But as against officers elected at a meeting held outside the state, those previously in office have the right to retain control of the affairs of the corporation. Hodgson v. Duluth, H. & D. R. Co. (Minn.), 49 N. W. 197 (Aug., 1891). The stockholders of a water-works corporation, organized under the laws of Kansas, met at Natchez, Miss., and passed resolutions authorizing its board of directors to issue bonds, and execute a mortgage to secure bonds, which the board of directors did in pursuance of such resolution. It was held that, although the stockholders' meeting was illegal, the mortgage was valid, inasmuch as the board of directors had power to mortgage the property without special authority, unless restrained by the charter or by-laws or the law of Kansas. Thompson v. Natchez Water & Sewer Co. (Miss.), 9 So. 821 (Sept. 1891).

1 Wood v. Boney (N. J.), 21 A. 574.

2 Graham v. Boston, H. & H. R. R. Co., 118 U. S. 161; Covington, etc., Bridge Co. v. Mayer, 31 O. St. 317; Ohio, etc., Ry. Co. v. People, 121 Ill. 483; 14 N. E. Rep. 874.

their acts done and contracts made thereat are valid and enforceable.[1]

§ **384. Of the manner of voting.**—The members having assembled, it is their right to control and conduct the voting according to law, the charter or articles and by-laws. The right to appoint inspectors or judges of elections is vested in them and not in the directors.[2] The manner of expressing the will of the members is immaterial, and mere informalities will not be regarded, provided the will of the majority be clearly and fairly expressed.[3]

Every qualified stockholder present at an election has a right to vote at one time the number of shares owned by him for the whole number of directors to be elected, and to cumulate his shares upon one candidate or to distribute them among as many candidates as he may see fit; and the corporation has no power to adopt any mode of election which will interfere with this right, when given by statute.[4]

§ **385. Calling meeting to order.**—The time within which a meeting should be called to order after assembling will depend largely upon the circumstances

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[1] Wright v. Bundy, 11 Ind. 398, 404; Barsett v. Monte Cristo, etc., Co., 15 Nev. 293; Ohio, etc., R. R. Co. v. McPherson, 35 Mo. 13; Wood Hydraulic, etc., Co. v. King, 45 Ga. 34; Saltmarsh v. Splauding, 147 Mass. 244; 17 N. E. Rep. 316; Reichwald v. Com., etc., Co., 106 Ill. 439; Galveston, etc., R. R. Co. v. Cowdrey, 11 Wall. 459, 476; Bellows v. Todd, 39 Ia. 209; Ames v. Conant, 36 Vt. 744; McCall v. Bryan Mfg. Co., 6 Conn. 428; Smith v. Alvord, 63 Barb. 415; Corbett v. Woodward, 5 Sawy. 403.

[2] State v. Merchant, 37 O. St. 251; In re Light Hall Mfg. Co., 47 Hun, 258.

[3] Phillips v. Wickham, 1 Paige, 590; Dowing v. Potts, 3 Zab. 66; People v. Albany, etc., R. R. Co., 55 Barb. 344; Wheeler's Case, 2 Abb. Pr. N. S. 361; People v. Campbell, 2 Cal. 135; Hardenburgh v. Farmers', etc., Bank, 3 N. J. Eq. 68; Hughes v. Parker, 20 N. H. 58.

[4] Wright v. Cent. Cal. C. W. Co., 67 Cal. 532; State v. Smith (Or.), 15 P. 386.

in each case. There should be no unreasonable delay, and yet sufficient time should evidently be given to enable the members to assemble. The meeting should not be delayed so long as to create the impression that no meeting is to be held and cause the larger part of the members to disperse. A measure cannot, after such unreasonable delay, be legally adopted which could not have been adopted but for the delay.[1] In the absence of proof to the contrary, it will be presumed that a meeting was held at a suitable hour and in pursuance of the notice.[2]

§ **386. Statutory regulations.**—All provisions, requirements and regulations governing elections, whether found in the statutes or in the by-laws, framed under authority derived from statutes, must be substantially pursued.[3] Thus where the statute provided that the board of directors should be annually elected by the stockholders at such time and place and upon such notice as should be provided by the by-laws of the corporation, it was held that unless all the stockholders were actually present, either in person or by proxy, such annual meeting could not not be held until after notice, and that under a by-law directing that annual meetings should be held on the third Monday in April, a notice of a meeting which did not specify the time of day at which the meeting would be held was insufficient.[4]

So, where stockholders were restrained from holding

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1 South School Dist. v. Blakeslee, 13 Conn. 227. See State v. Bonnell, 35 Ohio St. 10.

2 South School Dist. v. Blakeslee, supra; Younglove v. Steinman, 80 Cal. 375; 22 P. 189.

3 See State v. Le Kemp, 4 Ohio Cir. Ct. 257; State v. Stockley, 45 Ohio, 304; 13 N. E. 279.

4 San Buenaventura Mfg. Co. v. Vassault, 50 Cal. 534. See also Zion M. E. Church v. Hillery, 51 Cal. 155.

their annual election for directors at the time fixed, and the election was held several hours afterwards by a minority, without notice to the others, it was held that such an election had no validity at law.[1]

Where the corporation failed to provide in its by-laws any of the necessary steps in the calling and holding of an election, as it might have done, and the general law concerning corporations contained a provision on that subject, the latter governed and should have been followed.[2]

The statute having provided that each shareholder voting may cumulate or distribute his shares at option, a corporation cannot contravene that provision by adopting another mode.[3]

So where the statute authorized a majority of the board of directors to do a corporate act, and a by-law authorized a vacancy in the office of trustee to be filled by a less number than a majority, it was held that such by-law, being contrary to the charter, was void.[4]

But where it was shown that part of the members assembled fifteen minutes before the hour appointed, organized and proceeded with the election of officers for which the meeting was called, and that other members at or about the hour fixed met in another room, organized and also had an election, it was held that the first-mentioned meeting was irregular and void as to the

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1 State v. Bonnell, 35 Ohio St. 10.

2 Matter of L. I. Ry. Co., 19 Wend. 37.

3 State v. Stockley, 45 Ohio, 304; 13 N. E. 279; 67 Cal. 532.

4 Corey v. Curtis, 9 Nev. 325. Although directors hold office until their successors are elected and qualified, yet the law contemplates that an election shall be held periodically, according to the general law. Curtis v. McCulloch, 3 Nev. 202. And it is the duty of directors to exercise a wise and just discretion in calling and fixing time and place for the annual election. State ex rel., etc., v. Lady Bryan M. Co., 4 Nev. 400. The right to demand an annual election, as required by law, belongs to every stockholder. State ex rel., etc. v. Wright, 10 Nev. 167.

non-participating members ; that the irrgularity was not cured by re-organizing the meeting at the proper time, and going through the same proceedings, it being in fact and legal effect a continuation of the first meeting. It was also decided that the second meeting was legal, and those elected to offices thereat entitled to hold them.[1] But if called together for a particular purpose stated in the notice, they cannot proceed to the transaction of other business without unanimous consent of the membership.[2]

The length of time during which the polls should be kept open is a matter largely within the discretion of the inspectors ; but it is a trust they will not be allowed to grossly violate. The time should be long enough to give all a fair opportunity to vote.[3]

§ 387. **Voting by proxy.**—Proxy voting was not recognized by the English Common law,[4] but has become so universal a custom in this country, that the right would at the present day probably be held to exist even in the absence of statutory provisions . where so provided in the by-laws.[5] and the form of authority, so to vote is

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1 People v. Albany, etc., R. R. Co., 55 Barb. 344. If the statute does not require the business to be transacted to be stated in the notice, the meeting may entertain and pass upon any ordinary matter pertaining to the corporate interests. Schoff v. Bloomfield, 8 Vt. 472; Granger v. Original, etc., Co., 59 Cal. 678.

2 Machel v. Nevison, 11 East. 84.

3 Matter of Chenango County Mut. Ins. Co., 19 Wend. 635; People v. Albany, etc., R. R. Co., 55 Barb. 344.

4 Willcocks ex parte, 7 Cowen, 402. See McDaniels v. Flower Brook Mfg. Co., 22 Vt. 274.

5 Phillips v. Wickham, 1 Paige, 590, 598; Com. v. Detwiler, 131 Pa. St. 614; People v. Twaddell, 18 Hun, 427; Commonwealth v. Bringhurst, 103 Pa. St. 134; Taylor v. Griswold, 14 N. J. Law, 222. But see Brown v. Com., 3 Grant's Cas. 209; State v. Tudor, 5 Day, 329. Compare Matter of Baker, 6 Wend. 509. The Cal. Statute recognizes the right and empowers all corporations to regulate the manner by by-laws, only requiring that proxies shall be in writing. Civ. Code, sec. 312.

immaterial.[1] The right is given, however, by statute in most, if not all the states.[2] The right was not recognized by the civil law, unless allowed by overruling custom.[3]

There are important differences in this, as in the provision respecting other matters pertaining to corporate elections in the various states, so that for a clear understanding reference must be had to the statutes of the particular state where the question arises. A proxy cannot be used for any purpose other than that for which it was given. Where it authorizes the holder to vote, he cannot represent the stockholder on other questions, such as a dissolution of the corporation or sale of the entire corporate property and business.[4] Authority to vote by proxy can by no means be construed to authorize the sanction of an *ultra vires* act.[5]

§ 388. Notice of meeting.—In order to constitute a

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[1] In re St. Lawrence Steamboat Co., 44 N. J. L. 529, 534, the court said:—"A stockholder, who desires to exercise his right to vote on his stock by proxy is undoubtedly bound to furnish his agent with such written evidence of the latter's right to act for him as will reasonably assure the inspectors that the agent is acting by the authority of his principal. But the power of attorney need not be in any prescribed form, nor be executed with any peculiar formality. It is sufficient that it appear on its face to confer the requisite authority, and that it be free from all reasonable grounds of suspicion of its genuineness and authenticity; and the court, in reviewing the proceedings at an election, must be satisfied that the inspectors had reasonable grounds for rejecting the proxy." See also, Re Cecil, 36 How. Pr. 477; Marie v. Garrison, 13 Abb. N. C. 210.

[2] Comm. v. Bringhurst, 103 Pa. St. 134; s. c. 49 Am. Rep. 119; Taylor v. Griswold, 14 N. J. 222; Craig. v. First Pres. Ch., 88 Pa. St. 42; In re Lighthall Mfg. Co., 47 Hun, 258.

[3] Ayliffe, Civ. L. 202.

[4] Abbott v. Am. Hard Rubber Co., 33 Barb. 578, 584; Cumberland Coal Co. v. Sherman, 30 Barb. 552, 577; Matter of Wheeler, 2 Abb. Pr. N. S. 361; Marie v. Garrison, 13 Abb. Pr. N. C. 310, 335; Reg. v. Gov. Stock Co., L. R. 3 Q. B. D. 442.

[5] Brown v. Byers, 16 M. & W. 252. It was held that a proxy for the purpose of voting could not be used at an election four months later. Howard v. Hull (Eng.), 5 Ry. & Corp. L. J. 255.

legal meeting notice to all the members is essential.[1] In few cases is it necessary to prove actual personal notice to each member, but some general form of notice is usually prescribed by the statute, articles or by-laws, and then it is only necessary to follow the prescribed method of notification.

§ **389. Time of notice.**—The notice should contain the date, time of day, place and business proposed to be transacted; though if the meeting be for transacting the ordinary business the object need not be stated.[2] If no length of time of notice be fixed by the articles or by-laws, notice must be given a reasonable time before the meeting.[3]

Where long notice is provided for, the courts incline to require strict compliance on the theory that it furnishes opportunity for a full attendance, enables the members to qualify themselves for voting, and is a safeguard against collusion and the evils which might result from advantage being taken of a partial attendance.[4] In New York the power to review corporate

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[1] Notice that a meeting will be held upon the happening of an event, without a further notice that the event has occurred rendering the meeting necessary, is not sufficient to bind the members by proceedings taken at a meeting so noticed and held. Alexander v. Simpson, 43 Ch. Div. 139.

[2] Matter of British Sugar Refin. Co., 3 K. & J. 408; Graham v. Van Diemen's Land Co., 1 H. & N. 541; 26 L. J. Exch. 73; Fox's Case, L. R. 6 Ch. 176; Cleve v. Financial Corp., L. R. 16 Eq. 363. See Granger v. Original Empire Mill, etc., Co., 59 Cal. 678; Johnston v. Jones, 23 N. J. Eq. 216.

[3] Rex v. May, 5 Burr, 2681; Rex v. Hill, 4 B. & C. 426; Wiggin v. Freeman Baptist Church, 8 Met. 301.

[4] Matter of Long Island R. R. Co., 19 Wend. 37. See U. S. v. McKelden, 4 McArthur, 162. An able exposition of the rule requiring the prescribed mode of calling a meeting and giving notice for the length of time named in the by-laws is found in the case of the San Buenaventura, etc., Co. v. Vassault, 50 Cal. 534. The court said:—"The statute requires that the board of trustees shall be 'annually elected by the stockholders, at such time and place, and upon such notice . . . as shall be directed by the by-laws of the company.' The plain meaning of this is, that the annual meeting cannot, unless all the stockholders be actually present and consenting in person or by proxy, be legally held until after notice of the time and place thereof first be given

elections and make such orders as the nature and justice of each case requires is vested in the supreme court sitting as a court of chancery.[1]

§ **390. Manner of giving notice.**—Where the by-laws directed notice to be given by the clerk by posting up written notices, notice given in a different manner was rejected, and no parol evidence was admitted to prove the required notice until after proof of the loss of the original.[2]

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in some authentic and legal mode. Here, there was none given, unless we consider that the first clause of the twelfth by-law of this corporation of itself operated the requisite notice. That clause is as follows:—" The annual meetings of the stockholders shall be held on the third Monday in April, at the office of the company, in San Francisco." Conceding that this by-law is notice *per se* that the annual meeting of stockholders will be held on the third Monday in April of each year, it is insufficient as a notice of the point of time during that day at which the meeting is to be held. Had the by-law in question provided that the annual meeting should be held in the third week of the month of April of each year, it would have been clearly insufficient as a notice of the time at which the meeting would be held, and would have been construed as merely directing the proper officers to give notice of a meeting to be held at some specified time during the designated week. The fact that the by-law here names a day upon which, instead of a week within which, the annual meeting is to be held, while it may diminish, does not remove the uncertainty as to the time at which it is to be held. A meeting held on that day, at any time within the business hours customarily observed in San Francisco, might be fairly claimed to have been held pursuant to the notice. A body of the stockholders might meet at ten o'clock A. M. of that day and proceed to transact the business of the annual meeting, including the election of trustees; at a later hour of the same day—say at twelve o'clock A. M.—another body of the stockholders, it may be representing the actual majority of the stock, might convene and proceed to elect a different board of trustees, and each of these bodies might equally claim to have proceeded pursuant to the notice contained in the by-laws of the corporation. In view of the frequent and constantly recurring struggles by different combinations of stockholders to obtain control of the corporate direction, often resulting in serious embarrassment to the corporate interests, it is highly important that the notice should be so definite and certain in its character as to leave no room for controversies such as the one now before us."

[1] Mickles v. Rochester City B'k, 11 Paige, 118; Vanderburgh v. Broadway R. R. Co., 29 Hun, 348; 1 Rev. Stat. ch. xviii., title iv., sec. 5, p. 603; Title ii., art. 2, sec. 47–50, p. 598. See the Schoharie Val. R. R. Case, 12 Abb. Pr. (N. S.) 394; Ex parte Willcocks, 7 Cow. 402; In the Matter of the Long Is. R. R. Co., 19 Wend. 37.

[2] Stevens v. Eden Meeting House Soc., 12 Vt. 688.

The formal preliminaries to notice may be dispensed with where no substantial rights are thereby affected; for it is the opportunity to appear and participate at the meeting afforded by the notice, and not those unimportant steps which led to the giving it, which interests the members.[1]

In regard to the necessity of compliance with mere formalities, precedent steps to the calling of a corporate meeting, much will depend upon whether the language of the statute or constating instrument in which it is used is directory merely or imperative and prohibitory.

Where a particular kind of business is always transacted on a set day, no notice of the meeting need be given. But if, at such meeting, other important business than that usually transacted is proposed to be attended to, a notice stating such intention and the nature of such business should be given to all the members.[2]

The same principles governing notice apply to meetings of select bodies of the corporation,—the board of directors, for instance—as to general corporate meetings of the members at large.[3]

§ **391. Waiver of notice.**—In such matters as affect only the individual interest of a stockholder in the busi-

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1 Where a by-law required the application of a given number of members to be presented to the president prior to the calling of a meeting, it was held that a meeting called with due notice without such application was legal. Cit. Mut. Fire Ins. Co. v. Lortwell, 8 Allen, 217.

2 Wilcox on Corp. 42, 43.

3 A notice to the directors of a bank informed them that the object of the meeting was for the transaction of important business without specifying the kind of business. The notice was held insufficient to authorize a quorum less than all the directors to mortgage the real estate of the bank, that being considered within the scope of its ordinary business. Savings Bank v. Davis, 8 Conn. 191. In Harding v. Vandewater, 40 Cal. 78, only seven of the nine directors of a mining company had held a special meeting and levied an assessment without notice to the other directors. The court held that the assessment was not binding upon a stockholder who resisted payment, although he had, without notice of its invalidity, given his note to the company for the amount.

ness done at a corporate meeting, he may waive notice of such meeting as in other cases.[1] Attendance at a meeting was held an admission of notice,[2] but it is otherwise where a particular form and manner of notice is prescribed by statute.[3] The right to notice is waived so far as it affects the appointment of an agent at such meeting, by dealing and offering to deal with him, and thus recognizing the validity of his appointment.[4] Participation by an officer in making a call estops him from afterwards setting up irregularities in calling and holding the meeting at which it was made.[5] The right to object to irregularities in giving notice is personal to each stockholder, so that one cannot object on the ground that another was not notified where the latter has waived notice.[6]

§ 392. **Meetings must be called by proper authority.**—The charter, articles or by-laws usually designate the officers or agents who shall have authority to call meetings. The managing agents usually have implied authority to do so whenever they deem it necessary, if no express provision is made in the constating instruments.[7] A meeting not called by the proper authority is not legal

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[1] As by ratification at a subsequent meeting. Richardson v. Vt. & V. Co., 44 Vt. 613. Appearing at such meeting and voting. Jones v. M. & R. Tp. Co., 7 Ind. 547. See also, Ex parte Faris, 26 L. J. Ch. 369; Kenton Fur. v. McAlpine, 5 F. 737; Porter v. Robinson, 30 Hun, 209; King v. Chetwynd, 7 Barn. & C. 695.

[2] People v. Peck, 11 Wend. 604. See also, Stebbins v. Merritt, 10 Cush. 27; In re Joint Stock Cas. Act, 3 Kay & J. 403; In re British, etc., Co., 3 Kay & J. 408.

[3] United States v. McKelden, 8 Rep. 778; Matter of Long Island R. R. Co., 19 Wend. 37; The King v. Theodorick, 8 East, 543.

[4] Bryant v. Goodnow, 22 Mass. 228.

[5] Schenectady, etc., Plank Road Co. v. Thatcher, 11 N. Y. 102; Bucksford, etc., R. R. Co. v. Buck, 68 Me. 81.

[6] Schenectady, etc., Co. v. Thatcher, 11 N. Y. 105; Matter of Election, etc., M. & H. R. Co., 19 Wend. 135. Compare State v. Pettinelli, 10 Nev. 141; Samuel v. Holladay, 1 Woolw. 400.

[7] Stebbins v. Merritt, 10 Cush. 27.

unless all the members entitled to vote attend.[1] But statutes designating particular corporate authority for calling meetings are generally held to be directory merely.[2] Hence it is held that corporate meetings may be called by other officers than those designated in the statute;[3] and it is held that if a majority of the members vested with authority to call a meeting neglect to do so, a minority may call it, and bind the corporation.[4] The same construction is also given to by-laws on the subject of corporate meetings.[5]

Statutory remedies are given in some states to members of corporations when there is no person authorized to call or preside at a meeting.[6] Where the officers having authority refuse wrongfully to call a meeting, the members or shareholders may ordinarily obtain a writ of mandamus compelling them to perform that duty.[7]

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[1] Bethany v. Sperry, 10 Conn. 200; Reilly v. Oglebay, 25 W. Va. 36. In Johnston v. Jones, 23 N. J. Eq. 216, it was held not sufficient that a majority of the directors of the corporation had signed the call for a meeting, the notice not stating that it was given by authority of the board and not being signed by those calling the meeting as directors. It was held that where authority to call meetings is in the directors, the president has no power to call a meeting. State v. Pettinelli, 10 Nev. 141. See also Evans v. Osgood, 18 Me. 213. Act Ky., April 2, 1888, providing for the election of president and directors of a turnpike company, in which the state was interested and could vote, to be held on the first Tuesday in May following, not being in time to require all the stockholders to take notice of the passage and be present, and not giving special authority to any one to call a meeting, only the president and directors could make the call, and an election held on call of a person claiming to act as the state proxy is illegal. Cassell v. Lexington H. & M. Turnpike Road Co. (Ky.), 9 S. W. 502.

[2] Judah v. Am. L. Ins. Co., 4 Ind. 332.

[3] Walworth v. Brackett, 98 Mass. 98; Newcomb v. Reed, 12 Allen, 362; Hardenburgh v. Farmers, etc., 3 N. J. Eq. 68.

[4] Busey v. Hooper, 35 Md. 15.

[5] Chamberlain v. Painesville, etc., R. Co., 15 O. St. 225; Cit. Mut. F. Ins. Co. v. Sortwell, 8 Allen, 217; State v. Pettinelli, 10 Nev. 141.

[6] In California any justice of the peace of the county where such corporation is established may in such case, on written application of three or more members, issue a warrant to one of the stockholders or members directing him to call a meeting. Civ. Code, sec. 311.

[7] People v. Cummings, 72 N. Y. 433; State v. Wright, 10 Nev. 167; People

No further notice to members is necessary after a meeting has once been properly organized. Any business may be transacted at an adjourned as at an original meeting, as it is but a continuation of the same; and whether the continuance is for many days or by adjournment from day to day, there is no loss or accumulation of powers.[1] But an adjourned meeting may be held in such a manner and under such circumstances as to operate a fraud upon members who are absent, without notice.[2]

§ **393. Election of officers.**—Courts of equity have never sought to evade the rules of law on the subject of voting, or gone behind the bare legal right of exercising voting powers when the case represented only the question of voting and the transaction was free from fraud, no matter what the features of hardship. But a court of equity will compel a proper transfer or compel a pledgee of stock held as security in the name of trustee, or upon action brought in proper season, to give a proxy to the *cestui que* trust.[3] And as between the parties and all the world, except the corporation, its creditors and sub-

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v. Governors of Albany Hospital, 61 Barb. 397; McNeely v. Woodruff, 13 N. J. Law, 352; Regina v. Aldman, etc., Ins. Soc. 6 Eng. L. & Eq. 365; s. c. 15 Jur. 1035. When no provision is made in the by-laws for regular meetings of the directors, the mode of calling special meetings must be called by special notice in writing to be given to each director by the secretary on the order of the president, or if there be none on the order of two directors. Cal. Civ. Code, sec. 320.

[1] Warner v. Mower, 11 Vt. 385, 391. See Schoff v. Bloomfield, 8 Vt. 472; Farrar v. Perley, 7 Me. 404; Smith v. Law, 21 N. Y. 296; People v. Batchelor, 22 N. Y. 128; Wills v. Murray, 4 Ex. 843; Regina v. Grimshaw, 10 Q. B. 747; Scadding v. Lorant, 3 H. L. C. 418.

[2] An election held after many adjournments by a minority in interest, at which directors were elected who attempted to repudiate a contract with the holder of a majority of the stock, was held so far invalid that a court of equity would enjoin such attempts. N. Y., etc., Co. v. Parrott, 36 F. 462; State v. Bonnell, 35 O. St. 10.

[3] Vowell v. Thompson, 3 Cranch U. S. C. C. 429; Merchants' Bank v. Cook, 4 Pick. 405.

sequent purchasers without notice, such transfers are valid and effectual to pass a complete title.[1]

A summary of judicial decisions on the question of the right to vote for officers may be stated thus: The certificate book, under statutes providing that the stock shall be divided into shares and certificates issued to shareholders, is conclusive evidence of ownership as between the record owner and the corporation for purposes of voting at elections.[2] Between others and for other purposes it is only *prima facie* evidence.[3]

Under similar statutes, it has been held not essential to constitute one a member that he have the certificate actually issued to him, at the time of offering to vote, the certificate being mere evidence of his right.[4] He

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[1] Parrott v. Byers, 40 Cal. 614; Com. B'k of Buffalo v. Kortright, 22 Wend. 362; Gilbert v. Manchester Iron Co., 11 Wend. 628; B'k of Utica v. Smalley, 2 Conn. 778; Com. v. Bringhurst, 103 Pa. St. 134; s. c. 49 Am. Rep. 119. In an action by stockholders to set aside an election of directors for illegality, the court allowed plaintiff to go behind the secretary's certificate book to ascertain the ownership of certain shares; and upon determining that the corporation itself was the real owner of the shares which had been voted by a trustee, in whose name they stood, ordered the election set aside. Brewster v. Hartley, 37 Cal. 15. The holder of a majority of the stock acquiesced in the organization of a stockholders' meeting, and made nomination for directors. Having been told by the officers of the meeting that he would not be allowed to vote the stock held by him, he and others withdrew from the meeting, and held another at the same time and place. Each faction elected directors. *Held* that, though the election by the minority was void under the statute, because a majority of the stock was not represented, no effect could be given to the election by the majority, who could not withdraw and organize another valid meeting. In re Argus Printing Co. (N. D.), 48 N. W. 347.

[2] The contrary doctrine was held in Allen v. Hill, 16 Cal. 114; but that decision has been disregarded, and the above rule adopted in two later cases. Stewart v. Mahoney Min. Co., 54 Cal. 150; People v. Robinson, 64 Cal. 373.

[3] Parrott v. Byers, 40 Cal. 614; Weston v. Bear River, etc., Min. Co., 5 Cal. 186; Same v. Same, 6 Cal. 424; Strout v. Natoma Water & Min. Co., 9 Cal. 78; Neagle v. Pacific Wharf. Co., 20 Cal. 529; People v. Elmore, 35 Cal. 653; Farmers' Nat. Gold Bank v. Wilson, 58 Cal. 600; Anglo Cal. B'k v. Granger's B'k, 63 Cal. 359.

[4] Hawley v. Upton, 102 U. S. 314; Chester Glass Co. v. Dewey, 16 Mass. 94; Beckett v. Houston, 32 Ind. 393; Agricul. Bank v. Burr, 24 Me. 256; Same v. Wilson, Ib. 273; Buffalo & N. Y. City R. R. Co. v. Dudley, 14 N. Y. 336; Farr v. Walker, 3 Dillon 506; First. Nat. B'k v. Gifford, 47 Ia. 575.

becomes a shareholder by virtue of the subscription and before the issuance of any certificate, in the absence of any provision requiring payment as a condition of membership.[1]

§ **394. Mode of electing.**—In the absence of statutory or charter regulations, the members or shareholders may adopt any feasible method, consistent with the laws and constitution of the state and the United States, they may see fit for the election of officers. It is sometimes provided that the board of directors may themselves adopt by-laws governing elections.[2]

§ **395. Regularity of proceedings presumed.**—Every presumption will be made in favor of the regularity of the proceedings of a meeting legally called and held.[3] "The presumption '*omnia rita acta*' covers multitudes of defects in such cases, and throws the burden upon those who deny the regularity of a meeting for want of due notice to establish it by proof."[4] And the law

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1 Coquard v. Marshall, 14 Mo. App. 80; Waukegon Ry. Co. v. Dwyer, 49 Ib. 121.

2 In Cal. no such power is given, and all by-laws of all corporations must be adopted by a majority vote of all the stockholders or members within one month after incorporation. Civil Code, sec. 301. Such by-laws may provide, among other things, fully and specifically for elections, where no provision is specially made. Civ. Code, sec. 303, as amended 1889. In Oregon the persons organizing themselves into a corporation have the power to make the by-laws for the management and general regulation of its affairs.

Under this general power or reservation of power, it is presumed no power to create by-laws vests in the directors. Consequently all regulations concerning elections are contained in other parts of the general law, or reserved to the corporate body, to be expressed in by-laws. Hill's Ann. L. Oregon, sec. 3221. Substantially the same provision is found in the Laws of Nevada. Gen. St. (1882), sec. 805.

3 Blanchard v. Dow, 32 Me. 557; Ashtabula, etc., R. R. Co. v. Smith, 15 Ohio St. 328; Hardin v. Ia. Ry. & Constr. Co., 78 Ia. 726; 43 N. W. Rep. 543.

4 Sargent v. Webster, 13 Metc. 497; Chase v. Tuttle, 55 Conn. 455; 12 A. 874; Granger v. Original, etc., Co., 59 Cal. 678. But the presumption being

presumes, until the contrary appears, that valid notice of a corporate meeting which has been held was given to every stockholder, and that the meeting itself was regularly called and held.[1]

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once rebutted by proof is of no force. Where a by-law of a corporation required its secretary to give due notice of meetings of the board of directors, and a sale of all the corporate property was made at a meeting of which one director was not notified, and from which he was absent, it was held that such sale was unauthorized and void. Farwell v. Houghton Copper Wks., 7 Fed. Rep. 67. If no record of the proceedings at a corporate meeting is kept parol, evidence is admissible to show what was done. Ten Eyck v. Pontiac, O. & P. A. R. Co., 74 Mich. 226; 41 N. W. 905. See Saltmarsh v. Spaulding, 147 Mass. 224; 17 N. E. 316; Thompson v. Williams, 76 Cal. 153; 18 B. 153; Met. T. & T. Co. v. Tel. Co., 44 N. J. Eq. 568; 14 A. 907; Longmont, etc., Co. v. Coffman, 11 Colo. 555; Wood v. Constr. Co., 56 Conn. 87; 13 A. 137.

[1] McDaniels v. Flower Brook, etc., Co., 22 Vt. 274; Porter v. Robinson, 30 Hun, 209; Sargent v. Webster, 13 Met. 497; Medical & Surg. Soc. v. Weatherly, 75 Ala. 248; South School, etc., v. Blakeslie, 13 Conn. 227, 235; Lane v. Brainard, 30 Conn. 565; Pitts v. Temple, 2 Mass. 538; Capp. v. Lamb, 12 Me. 312; Tuttle v. Mich., etc., R. R. Co., 35 Mich. 247; Wells v. Rodgers (Mich.), 27 N. W. Rep. 671; Mut. Fire Ins. Co. v. Sortwell, 8 Allen, 217; Com. v. Woelpper, 3 S. & R. 29; Edgarly v. Emerson, 23 N. H. 555; State v. Smith, 48 Vt. 266.

CHAPTER XVI.

CONTROL BY MEANS OF BY-LAWS.

§ **396. Definition and object.**—A rule of a permanent character adopted by a corporation for its internal government, obligatory upon all its members, and also upon others who are acquainted with its method of doing business, is called a by-law.[1] The power to adopt rules for the government of the members, and for the administration of internal affairs, is necessarily incident to the authority to organize and conduct a corporate

[1] Grant on Corp., 76; Cummings v. Webster, 43 Me. 192; Drake v. Hudson Riv. R. Co., 7 Barb. 508. "The office of a by-law is to regulate the conduct and define the duties of the members toward the corporation and between themselves." Flint v. Pearce, 99 Mass. 70. See also Comm. v. Turner, 1 Cush. 496.

enterprise.[1] If it were not, it would be next to impossible to conduct its business in an orderly and efficient manner.

The distinction between a by-law and a regulation is this: A by-law binds the members only, while a regulation, if reasonable, affects third persons, who, having notice of it, deal with the corporation.[2]

§ 397. **How made and enforced.**—By-laws must, of necessity, be left, for the most part, to the discretion of those best acquainted with the interests and needs of the corporation, namely, the members themselves.[3] From the power to enact by-laws flows, as a natural consequence, the right to enforce them by the infliction of penalties for their violation. It may be provided by

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[1] 1 Blk. Com. 476; People v. Sailors' Snug Harbor, 54 Barb. 532; Carne v. Brigham, 39 Me. 35; Harrington v. Workingmen's Benevolent Ass'n, 70 Ga. 340; Poultney v. Bachman, 39 Hun, 49; State v. Tudor, 5 Day, 329.

[2] Morris & Essex R. Co. v. Ayers, 5 Dutch (N. J.), 393; State v. Overton, 24 N. J. L. 440; Compton v. R. Co., 34 N. J. 134. A person has the right to treat the by-laws given to him on his becoming a member of the association as all the by-laws such association had, and he is not bound to take notice of the modifications of such by-laws, with respect to withdrawing, on the record of the company simply, without further notice to him; which notice must be proven by the defendant company to have been given. McKinney v. Diamond State Loan Ass'n (Del.), 18 A. 995.

[3] Green's Brice's Ultra Vires, 2d. Am. Ed. 15. Voluntary associations resemble religious and other charitable and social corporations, with respect to the jurisdiction of courts to enforce by-laws. With respect to such, courts will leave members to the authority or tribunal within the corporation where the by-laws are valid, subject to the right to appeal on the ground of oppression or abuse of authority. The court has no visitorial power. The only question which it will determine is, whether they have been adopted in the way agreed upon by the members of the association. Kehlenbeck v. Lageman, 10 Daly (N. Y.), 447. See note to Loubat v. Leroy, 15 Abb. N. C. 45, on the subject of judicial interference in the affairs of incorporated societies. Such societies are nevertheless bound to observe their by-laws. See People v. Ben. Soc., 24 How. Pr. 216; Waechtel v. Noah Widow's Soc., 84 N. Y. 28; Fritz v. Muck, 62 How. Pr. 69; Labouchere v. Earl of Warncliffe, L. R. 13 Ch. D. 346; Dowing v. St. Columbia's Soc., 10 Daly (N. Y.), 262; Loubat v. Leroy, 40 Hun (N. Y.), 546; Fisher v. Kane L. R., 11 Ch. D. 353; Lehman v. Dist. No. 1 B. B., 39 Hun (N .Y.), 658.

the corporation that penalties in the nature of damages shall go to the corporation.[1] And it is most reasonable that it should be so, as the corporation is always, at least in legal contemplation, the party injured by violations of its by-law regulations.

The power to make by-laws, the manner of making them, and the matters which may be governed and regulated by them, are generally given and limited by charter or general law. A corporation may usually by its by-laws, where no other provision is specially made, provide for: 1. The time, place and manner of calling and conducting its meetings. 2. The number of stockholders or members constituting a quorum. 3. The mode of voting by proxy. 4. The time of the annual election for directors, and the mode and manner of giving notice thereof. 5. The compensation and duties of officers. 6. The manner of election and the tenure of office of all officers other than the directors; and 7. Suitable penalties for violations of by-laws, fixed at any reasonable amount in no case to exceed the statutory maximum.[2]

With respect to the ordinary power to enact ordinances, municipal corporations are viewed and dealt with by courts as are private corporations in the enactment of by-laws.[3]

§ 398. **Usually the province of members.**—The primary source of all authority in a corporation being the

[1] City of London v. Wood, 12 Mod. 669. See Ayliffe, Civ. Land, 202, 203.

[2] May adopt any reasonable by-laws within the scope of the purposes and regulating the manner of voting, holding meetings and directing the order of proceedings. Rex v. Spencer, 3 Burr. 827; Juker v. Com., 20 Pa. St. 484; Newburg v. Francis, 3 T. R. 189; People v. Kip, 4 Cow. (N. Y.), 382; Com. v. Woelper, 3 S. & R. (Pa.), 29.

[3] Spr. Val. W. W. v. San Francisco, 82 Cal. 286; Louis v. Weber, 44 Mo. 547; Dunham v. Rochester, 5 Cow. 462; Pedrick v. Bailey, 12 Gray (Mass.), 161; Mayor v. Winfield, 8 Humph. 767.

members at large, they alone have authority to enact by-laws in the absence of a provision in the general law or in the charter placing it in the hands of a select body, as the board of directors, for instance.[1] And where power to make by-laws on specified subjects is thus conferred upon the directors, either directly by law or through the membership, such by-laws must be confined to the subjects embraced within the scope of that authority; and the body of members at large, retains incidental power to make by-laws as to matters not so specified.[2]

The same body which enacts a by-law has power to repeal it in the same manner and by the same vote as that by which it was enacted.[3] And by-law provisions and requirements may be waived either by the corporation or its members.[4] But where authority to alter or amend laws was conferred upon a board of directors it was held that they had no power to repeal, alter or disregard a by-law containing a limitation of their power.[5]

§ 399. **Statutory provisions.**—When a statute or charter points out particular formalities, modes and limitations with respect to the making of by-laws, these must be strictly observed in order to render them valid and binding.[6]

The same rule applies to the enforcement of by-laws; for the right and the remedy, being both created

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1 Morton Gravel Road Co. v. Wysong, 51 Ind. 4; Rex v. Westwood, 2 Dow. & C. 21; 7 Bing. 1.

2 Per PARKE, B., Calder, etc., Nav. Co. v. Pilling, 14 M. & W. 81, 87; 16 M. & W. 228.

3 Smith v. Nelson, 18 Vt. 511; Rex v. Ashwell, 12 East, 22.

4 Provisions of by-laws with respect to notice of intention of member to withdraw may be waived. Kenney v. Diamond State Loan Ass'n (Del.), 18 A. 905.

5 Stevens v. Davidson, 18 Gratt. 819.

6 Lockwood v. Mich. Nat. B'k, 9 R. I. 308; Dunston v. Imperial Gas, etc., Co., 3 B. & Ad. 125.

by law, must be pursued and made available by the corporation together and on the prescribed terms.[1] It is seldom, however, that the statute or the constating instruments provide in detail the mode of executing by-laws or the remedies for their violation; and such matters are left to be regulated by the corporation itself.[2]

§ **400. Limitations upon the power to enact by-laws.**—The corporate body in the enactment of by-laws, within the limitations prescribed by law and the constating instruments, performs the functions of a legislative body, and its enactments create similar duties and restraints.

The test of the validity of a state law is whether it conflicts with constitutional provisions; but these and all else that come within the most comprehensive meaning of the term public law, together with the charter and articles of association, must be consulted for the source of, as well as the checks and limitations upon, the power of corporations to legislate in the form of by-laws.[3] A by-law which imposes conditions upon the right to vote in a conflict with or in addition to those prescribed by statute is invalid.[4]

In England, a by-law contrary to the general laws of

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[1] Union Mut. Ins. Co. v. Keyser, 32 N. H. 313.

[2] Morton Gravel Road Co. v. Wysong, 51 Ind. 4; People v. Throop, 12 Wend. 183; Child v. Hudson Bay Co., 2 P. Wm. 209.

[3] St. Louis v. Buffinger, 19 Mo. 13; Cunningham v. Alabama Life Ins. Co., 4 Ala. 652, 654; Taylor v. Carondelet, 20 Mo. 105; A. & A. on Corp. 177; Hopkins v. Mayor, etc., 4 M. & W. 621; Ballord v. Bank, 18 Wall. 589; People v. Crackett, 9 Cal. 110; Smith v. Nelson, 18 Vt. 511; U. S. v. Hart, 1 Pet. C. C. 390; Mt. Moriah Com. Ass'n v. Com., 81 Pa. St. 235; Evansville Nat. B'k, 45 N. Y. 655; State v. Williams, 75 N. C. 134; Presb. Church v. City of New York, 5 Cowen, 538. See People v. Crossly, 69 Ill. 195; Seneca County Bank v. Lamb, 26 Barb. 595.

[4] In re Lighthall, 47 Hun, 258, holding that where a statute provided that elections of officers should be made "by such of the stockholders as should attend for that purpose, either in person or by proxy," the corporation cannot require in a by-law that proxies can only be held by stockholders.

the kingdom is void, though justified by the terms of the charter.[1]

§ **401. Retroactive by-laws invalid.**—By-laws must not be retroactive. Accordingly a by-law amending the constitution of a corporation, so as to attach a new penalty to a default in addition to that existing at the time of its occurrence, was deemed analogous to a foreclosure decree fixing a shorter time for payment than that agreed upon by the parties, and clearly *ex post facto*.[2]

§ **402. By-laws cannot prejudice rights of third parties.**—A corporation cannot, by means of a by-law, impose either upon third parties, or its members with respect to third parties, any liability or remedy in addition to those created and provided by the general law;[3] and by-laws must be limited in their operation to such matters as concern the internal affairs of the corporation.[4]

A by-law of a bank is a contract of the stockholders among themselves; and in order to be binding upon a third party dealing with it, must be reasonable and be brought to his notice before the contract affected by it

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[1] 2 Kyd on Corp. 109; Norris v. Staps, Hobart, 210.

[2] Pillford v. Fire Dept., 31 Mich. 458. See also Dock Co. v. Heron, 52 Pa. St. 280. It was held that a by-law adopted after the issue of shares of stock providing that no transfer should be made when the owner was indebted to the bank was held not to bind the judgment creditors of the stockholders; although the statute declared that the shares should be transferable on the books of the corporation in such manner as the by-laws might direct. Byron v. Carter, 22 La. Ann. 98. Such purchase does not occupy the position of an innocent purchaser for value and without notice. These decisions are at variance with later views. Infra, § Ch. XIX.

[3] Flint v. Pierce, 99 Mass. 68; Mechanics' B'k v. Smith, 19 Johns. 115; Susquehanna Ins. Co. v. Perrine, 7 Watts & Serg. 348; Marietta v. Fearing, 4 Ohio, 427. See State v. Curtis, 9 Nevada, 325.

[4] Seneca County Bank v. Lamb, 26 Barb. 595. Before a creditor can recover on the strength of the provisions of a by-law, he must show in addition some privity, as, for instance, that his claim is for value advanced upon the credit of the by-law. Flint v. Pearce, 99 Mass. 68.

was made.[1] And the same rule applies to other corporations, whether public or private.[2]

§ **403. Invalid provisions.**—A by-law subjecting the members of a corporation to expulsion if they resorted to the courts for redress for wrongs, and refusing to submit their grievances to arbitration, was held void as against public policy.[3]

A by-law was held valid, however, which added the penalty of expulsion to legal liability for their violation of a contract, notwithstanding such contract may be void by the statute of frauds.[4] And a by-law which affixes a penalty to an act may be valid, though the matter is regulated by a statute which also affixes a penalty.[5]

Where a by-law consists of several distinct parts or independent clauses, it may be void in part and valid in part; but when it is entire and its parts are inseparable, it is void altogether if any part of it is open to legal objection.[6] But if a part is void and the whole forms an entirety, so that the part which is void influences the whole, the entire by-law is void.[7]

§ **404. Must be reasonable and necessary.**—The determination of the question of the necessity for a by-law is left largely to the corporation, or the body within it,

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[1] Mechanics & Farmers' B'k v. Smith, 19 Johns. 115.

[2] Galatin v. Bradford, 1 Bibb. 209; Hayden v. Noyes, 5 Conn. 391; Peck v. Lockwood, 5 Day. 22; Marietta v. Fearing, 4 Ohio, 427; Austin v. Murray, 16 Pick. 121; Milhau v. Sharp, 17 Barb. 435; 27 N. Y. 611; Dunham v. Trustees, etc., 5 Cow. 462; Strauss v. Pontiac, 40 Ill. 301; Austin v. Murray, 16 Pick. 125; Wreford v. People, 14 Mich. 41.

[3] State v. Merchants' Exch., 2 Mo. App. 96.

[4] Dickinson v. Chamber of Commerce, 29 Wis. 45.

[5] Rogers v. Jones, 1 Wend. 237.

[6] Amesbury v. Bowditch Mut. Fire Ins. Co., 6 Gray, 596; Rogers v. Jones, 1 Wend. 237.

[7] State, etc., v. Curtis, 9 Nev. 325.

enacting the by-law; but the presence or absence of its necessity sometimes affects the question of its legality.[1]

The power to enact by-laws must not be exercised in such a manner as to cause great vexation and unnecessary inconvenience. Such by-law will be deemed unreasonable, and for that reason in conflict with the spirit of the law conferring authority to enact by-laws.[2]

Nor can the corporation enforce a by-law requiring formalities so extraordinary as to amount to a material inconvenience in the transfer of shares.[3] The imposition of unreasonable restrictions upon the right is not allowed, on the same principle that no rights can be impaired or taken away.[4] "The unreasonableness of a by-law should be demonstrably shown. Courts in construing by-laws will interpret them to be reasonable if possible, not scrutinizing their terms for the purpose of making them void, nor holding them invalid if every particular reason for them does not appear."[5]

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[1] Zlystra v. Charleston, 1 Bay, 382; McMullan v. Charleston, Ib. 46. See Barter v. Com., 3 Pen. & W. 253.

[2] Mobile v. Yuylle, 3 Ala. 137; Hibernia Fire Engine Co. v. Harrison, 93 Pa. St. 264.

[3] Bank of Ky. v. Schuylkill Bank, Parson's Sel. Cas. 180.

[4] 2 Kyd on Corp., 122. A by-law providing that transfers could only be made personally or by attorney and with the assent of the president is contrary to law in restraint of trade and unenforceable. Sargent v. Franklin Ins. Co., 8 Pick. 890.

[5] Ib. See also Hibernia Fire Eng. Co. v. Harrison, 93 Pa. St. 264. A by-law of a benevolent association providing as a penalty for the non-payment of dues that a delinquent member should forfeit his right to any benefits while in arrears, and for a period of three months after the payment of arrears, is invalid because unreasonable, oppressive and detrimental to the interests of the corporation. Cartan v. Father Mathew, etc., Soc., 3 Daly (N. Y. C. P.), 20; Brady v. Coachman's Benev. Assn., 14 N. Y. S. 272. The same conclusion was reached where a by-law provided that every stockholder neglecting to pay his monthly dues and interest "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him." Such by-law allowed to be enforced gave authority to impose a fine that is cumulative, *i.e.*, to be imposed upon the aggregate amount of all money due at the end of each month, no matter for what cause, and, as such, it was oppressive, extortionate, and unreasonable, and therefore invalid. Lynn v. Freemansburg Building & Loan Ass'n, 117 Pa., 1; 11 A. 537.

§ **405. Power given by law to enforce conditions.**—A corporation may be empowered by its charter to not only regulate but control the transfer of stock, and to enact by-laws prescribing the conditions to be complied with in order to constitute a valid transfer; and when so empowered, it may refuse to register transfers made otherwise than in the manner pointed out.

But the purpose for which such power is vested in the corporation should be considered in construing by-laws providing for its exercise. If a by-law amounted to a virtual prohibition upon the transferability of shares, as if it assumed to prescribe the consideration for the transfer or to designate to whom it should and should not be made, it would be void.

The power conferred to regulate and control the transfer is conferred for the convenience and protection of the corporation, and no restraints beyond those that are necessary for these objects should be allowed. It is both convenient and necessary that the officers should have a record by which to legally test all claims of membership as against itself, for purposes of making assessments, holding elections and paying dividends; but it is not necessary for its protection in these matters that one person in preference to another should be entitled to these privileges and be subject to these burdens.[1]

§ **406. Must not be in restraint of trade.**—The right of alienation is an incident of ownership of property. All laws limiting or qualifying the free transfer of title to property, whether personal or real, in the United States are looked upon unfavorably, and by-laws of corporations

[1] For authorities and full decisions of validity and effect of by-laws regulating transfers of stock, see infra, Ch. XIX.

having that object in view or that effect are void as against public policy.[1]

The common law guaranteed to every man the right to exercise whatever trade he pleased, and courts in protecting that right nullified not only by-laws but charters of corporations.[2]

Most of the questions that have come before the courts, contesting the validity of by-laws on the ground that they were in restraint of trade, have been those of municipal corporations. But a distinction must be observed between a reasonable regulation of trade and a restriction imposed on it, whether introduced in a by-law of a private trading company or in a municipal ordinance. Those of the first kind are, if otherwise objectionable, generally held to be good; while those of the latter are universally held to be void; but it is often difficult to determine to which class they are assignable.[3]

§ 407. Must not be in restraint of personal liberty.—Very similar to the objection to a by-law that it is in restraint of trade, is that successfully argued in the case of the tailors of Ipswich.[4]

Corporate powers were conferred upon the tailors and clothworkers of Ipswich, with authority to make reasonable by-laws. Among the by-laws adopted was

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1 Tailors, etc., v. Ipswich, 11 Rep. 53; Butchers' Benev. Assoc., 35 Pa. St. 151; People v. Benev. Soc., 3 Hun (N. Y.), 361; People v. N. Y. Board of Underwriters, 54 How. Pr. 340; Sayre v. Louisville M. Benev. Assoc., 85 Am. Dec. 613; Heskith v. Braddock, 3 Burr. 1858; Moore v. Bank of Commerce, 52 Mo. 377; Clark v. Lecren, 9 B. & C. 52; Mayor v. Yuille, 3 Ala. 137; Cal. St. Nav. Co. v. Wright, 65 Am. Dec. 511; Goddard v. Merch. Ex., 9 Mo. App. 290; s. c. 78 Mo. 609; Chamberlain, etc. v. Compton, 7 D. & R. 601; King v. Coopers' Co., 7 T. R. 543.

2 Rex v. Hanger, 1 Rol. R. 148.

3 2 Kyd on Corp., 131; Mobile v. Yoville, 3 Ala. 141; Cunningham v. Ala. Life Ins. & Trust Co., 4 Id. 562.

4 11 Coke, 53.

one that "no person exercising any of these trades within the town of Ipswich shall keep any shop, chamber, or exercise the said faculties or either of them, or take an apprentice or journeyman until he has presented himself to the master and wardens of the said society for the time being, or some three of them, and shall prove that he has served seven years, at the least, as an apprentice, before he shall be admitted by them to be a sufficient workman."

The court held the by-law void for the reason that the statute had not restrained a person who had served as an apprentice for seven years from exercising the trade of a tailor, and that the company could not, for it would be against the liberty and freedom of the subject and enable the old and rich of the same trade to oppress the young tradesman, by delay or the extortion of money.

In the absence of a provision in the charter or statutes to the contrary, no residence qualifications can be required of shareholders in stock corporations ; and a by-law seeking to deprive one who has purchased a share of any substantial right connected with ownership of the same, is not uniform, is oppressive and cannot be enforced.[1] A member cannot be disfranchised without express power in the charter.[2]

§ **408. By-laws imposing forfeiture invalid.**—Forfeiture

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1 State v. Greer, 78 Mo. 188; Detwiler v. Com., 131 Pa. St. 614; 7 L. Rep. An. 357. See also Cent. R. R. Co. v. Penn. R. Co., 31 N. J. Eq. 485; Ward v. Maryland, 79 U. S., 12 Wall. 430; Corfield v. Cornell, 4 Wash. C. C. 380; Humphreys v. Mooney, 5 Colo. 282.

2 Com. v. St. Patrick Benev. Soc., 2 Binn. 441; Sargent v. Franklin Ins. Co., 8 Pick. 90; Germantown P. R. Co. v. Fitler, 60 Pa. St. 124. Non-resident stockholders take their shares with all the rights and privileges which pertain to them in the hands of citizens, and where no other qualification than ownership of stock is required they may become directors. Com. v. Detwiler, 131 Pa. St. 614.

of stock for non-payment of calls and assessments, being unknown to the common law, and being allowed only by statutes prescribing the method of procedure for that purpose, it is clear that a corporation will not be allowed to accomplish the same object in violation of the rights of members, or otherwise than in the statutory manner.[1] On the same principle a municipal corporation has no power to enforce an ordinance by the imposition of a fine and the forfeiture of property as an additional penalty. The power to impose a fine for violation of an ordinance given in a statute or charter excludes the corporation by implication from adopting any other punishment for disobedience to them.[2]

By-laws, though lawful, cannot be enforced by forfeitures and extraordinary penalties; for if allowed to do so corporations would soon set up particular laws in conflict with the law of the land. It is of the very essence of the law that no man can be dispossessed of his property otherwise than by due process of law; and all authority to enact and enforce by-laws is derivative from and subordinate to the general law.

In England, power to search for goods and to forfeit them when found, cannot be granted even by letters patent. Where such powers were contained in the charter of a company of dyers, the grant was adjudged void as contrary to *Magna Charta*.[3]

§ 409. **By-laws providing for forfeiture under authority conferred by charter or statute.**—When the statute or charter authorizes a forfeiture of the property interests

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1 Downing v. Potts, 23 N. J. 66; Matter of Long Island R. R. Co., 19 Wend. 37; Cotter v. Doty, 5 Ohio, 393; Small v. Herkimer Mfg. Co., 2 N. Y. 330.

2 Hart v. Mayor, etc., of Albany, 9 Wend. 571.

3 Waltham v. Austin, 1 Bulstr. 11, 12.

of members without prescribing the manner of enforcing it, no forfeiture can take place until the corporation in its constitution, by-laws or other constating instruments has clearly defined the offences for which it may occur, and laid down the plan of procedure.[1]

§ **410. Power to regulate does not authorize prohibition.**—There is an implied authority vested in the membership of a corporation to regulate the admission of members and transfer of shares of stock.

But authority " to regulate," whether implied or conferred by statute, does not empower them to prohibit or to restrain, at their discretion, or to place any unreasonable limitations upon the transfers. It merely empowers them to prescribe reasonable formalities to be observed in executing transfers.

It is convenient and essential to the protection of the interests, not only of the members of the corporation, but of the public, that books shall be kept for registry of change in ownership of shares as they occur. But authority to keep such registry and to require

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[1] Where an act incorporating a religious society gave the society power to provide for the sale or forfeiture of the shares or rights of pewholders for the non-payment of assessments, and the only article in the constitution bearing upon the subject provided that the proprietors might, at a meeting called for that purpose, by a two-thirds vote, tax themselves to raise money to repair their meeting-house when necessary, it was held that in the absence of more specific provisions or agreements the society had no right to enforce payment of assessments by a sale or forfeiture of the pews of delinquent members. Perrine v. Granger, 30 Vt. 595. But a by-law providing that if a member should be indebted to the corporation, his stock in it should be liable for such indebtedness and that the corporation might seize and detain his stock therefor, was held valid. Child v. Hudson Bay Co., 2 P. Wms. 207. A by-law of a building association which provides that each stockholder who fails to pay his monthly assessments shall be fined for the first and second weeks five cents, for the third week ten cents, and for each succeeding week 15 cents for each share of stock he owns, does not allow a fine of more than 15 cents a week on each share, though there is a failure to pay assessments for several successive months. Gouckenour v. Sullivan Bldg. & Loan Ass'n, 119 Ind. 441; 21 N. E. 1088.

notice of such transfers, and that they shall be recorded, does not carry with it discretionary power to refuse to register a proposed transfer, though such refusal be in the interest of the corporation.[1]

§ **411. Regulations not formally adopted.**—A regulation may become established by usage and long acquiescence so as to have all the force and effect of a by-law; yet it differs from a by-law in two important respects: first, in the manner of being proven, and secondly, it is not a distinctive feature in corporations. Where a particular usage is observed by all engaged in any particular class of business, whether conducted by corporations or natural persons, a requirement or regulation may be binding upon all dealing in it, whether formally adopted as a by-law or not. And such usage may be proven by evidence of the acts of a bank and parties dealing with it.[2]

§ **412. To what extent binding on third parties.**—Persons dealing with the officers and agents of a corporation are usually chargeable with notice of the authority conferred upon such officers and agents in the by-laws, but not to any greater extent.[3]

The provisions of by-laws are in the nature of the terms of a contract as between the members of a corporation, and between the latter and its members. The right of any third party to establish a claim against a corporation by virtue of a by-law depends upon the terms of the particular contract under which he claims. As between the members and officers of the corporation themselves, the by-laws have a direct bearing upon all

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1 This subject fully treated in infra, Ch. XIX.

2 Lockwood v. Mech. B'k, 9 R. I. 308; Walm's Assignee v. Bank of N. America, 8 S. & R. 73.

3 Adrienne v. Roone, 52 Barb. 399.

their dealings where corporate matters are involved. Whether with respect to a particular transaction compliance with the requirements of a by-law is indispensable or not depends upon the wording of the by-law and its subject matter.[1]

Where a by-law provided that a clerk should be sworn, it was held not an indispensable qualification, and that the by-law was directory only.[2]

If a corporation neglect to comply with a general statute in giving notice of a by-law, persons not having actual notice of it are not bound by it.[3]

A by-law of a bank that mistakes must be rectified at the time of receiving and depositing money is not binding upon the public, and a mistake may be subsequently shown.[4]

By-laws prescribing duties of directors may be so far modified or suspended by acquiescence of the members as to release the former. For instance, where the directors have for a long period delegated all the prescribed duties to agents and general managers, in which the members, having notice, acquiesced.[5]

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[1] While the members in their conduct are bound to observe the forms prescribed by the by-laws, State v. Pettinelli, 10 Nev. 141; Dunston v. Imp. Gas Lt. Co., 3 B. & Ad. 125; People v. Albany R. Co., 55 Barb. (N. Y.) 344; Johnston v. Jones, 23 N. J. Eq. 216; Conn. v. Woelper, 3 S. & R. (Pa.) 29; yet mere informalities will not be allowed to render an act invalid. People v. Campbell, 2 Cal. 135; Blanchard v. Dow, 32 Me. 557; People v. Albany R. Co., 55 Barb. (N. Y.) 344; Philip v. Wickham, 1 Paige (N. Y.), 590; Wheeler's Case, 2 Abb. Pr. N. S. 361; Downing v. Potts, 3 Zab. (N. J.) 66; People v. Peck, 11 Wend. (N. Y.), 641; Hardenburgh v. Farmers', etc., B'k, 3 N. J. Eq. 68; Hughes v. Parker, 20 N. H. 58; Ashtabula R. Co. v. Smith, 15 O. St. 328. The provisions of by-laws legally adopted are presumed to be known to all members. Inhabitants of Morton, 25 Mo. 593; Buffalo v. Webster, 10 Wend. (N. Y.) 99, and it is no objection that he was not a member when it was adopted. Treadway v. Hamilton Ins. Co., 29 Conn. 68; Cudden v. Eastwick, 6 Mod. 124; Susquehanna Ins. Co. v. Perrine, 7 W. & S. 348; London v. Vanacre, 13 Mod. 273.

[2] Lumbard v. Aldrich, 8 N. H. 31.

[3] Worcester v. Essex Merrimac Bridge Co., 7 Gray, 457.

[4] Mechanics' Bank v. Smith, 19 Johns. 115.

[5] Henry v. Jackson, 37 Vt. 431.

§ **413. Validity a question of law.**—The court must determine upon the facts presented in each case of objection that a by-law is unreasonable, contrary to law or public policy, or deprives a party of a right or of property without due process of law, whether or not such objection is well taken. All regulations of a company which affect only the members may, in this respect, be treated as by-laws, whether formally adopted and recognized as by-laws or not.[1]

§ **414. Proof of by-laws.**—The usual occasions when the provisions of a by-law become a matter of material inquiry is when a right, duty, regulation, or liability *ex contractu* is thereby created or defined. Since no tort or violation of law may be authorized or justified in by-laws, it is only where they expressly or by implication are supposed to have entered into the terms of a contract that proof of them becomes necessary.

As in other cases where a record has been kept or is required to be kept the best evidence is such record. What they are, and the authority conferred by them, can be most accurately, and generally most easily, ascertained by the production of the by-laws themselves.

But while the book of minutes is the best evidence, circumstances may be such as to dispense with its production. Thus the charter and by-laws of an insurance company, though not set out in the pleadings, may be proved by printed copies attached to a policy of insurance, it appearing that the policy was accepted by the defendant.[2]

1 State v. Overton, 4 Zab. 435; People v. Miller, 39 Hun, 557; Com. v. Worcester, 3 Pick. (Mass.) 473. It was held that charges which submit to the jury the construction of by-laws of the company relating to the appointment and powers of agents are properly refused. Tennessee Riv. Transp. Co. v. Kavanaugh (Ala.), 9 So. 395 (Aug. 1891).

2 Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252.

And where there is no record or the record is unintelligible, the enactment of a by-law may be inferred from proof of other facts. They are not contracts, but a recognition only of certain written rules enacted by the corporation for its own government and that of its officers and servants, and it is immaterial in what manner or by what its assent to them is manifested.[1]

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[1] Union Bank of Me. v. Ridgley, 11 Harr. & Gill. 324, 413; Reuter v. Tel. Co., 6 Ell. & Bl. 341; Lockwood v. Mech. Nat. B'k, 9 R. I. 308.

CHAPTER XVII.

POWERS AND DUTIES OF DIRECTORS.

§ 415. Variously designated.—The members of the controlling board of a corporation bear various titles, but usually that of directors, which term, when here used, is to be understood as applying to the managing board, however designated in the charter or articles.[1]

The manner of electing directors, their qualifications

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[1] A director is an "officer" within the meaning of one section of an act containing another section which requires that the annual report shall be signed by the president and a majority of the directors. Brand v. Goodwin, 29 N. Y. St. Rep. 143; 8 N. Y. S. 339.

and the organization of the board are usually provided for and prescribed by statute in the states where corporations are created by general law. Where chartered by special acts, these must be consulted for information in each particular case.

§ **416. Qualifications.**—The directors are usually required to be shareholders; but when neither the articles of incorporation nor the statute prescribe it, it is not necessary.[1] Where the ownership of shares is required, it is held to be complied with, if the party is the legal owner.[2]

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[1] State v. McDaniel, 22 O. St. 354; Re British, etc., Ass'n, L. R. 5 Ch. D. 306. In Connecticut stockholders who are stockholders in other corporations are ineligible as directors. Chase v. Tuttle, 55 Conn. 455; 12 A. 874.

[2] It was held that though the owner had mortgaged, his stock, he had not thereby become disqualified, Cunning v. Prescott, 2 Younge & C. 488, that persons not interested, but attempting to qualify themselves by fraudulently receiving to themselves transfers of stock, were not eligible. Bartholomew v. Bentley, 1 O. St. 37. But see State v. Leete, 16 Nev. 242; State v. Houston, 28 Vt. 595. To same effect is People v. Robinson, 64 Cal. 373. Comp. Laws N. D. § 2926, provides that, to be a director of a corporation, one must be the holder of stock, and section 2915, that a transfer not entered on the corporate books shall not be valid for any purpose except between the parties. *Held*, that an assignee of stock not transferred on the corporate books was not eligible as a director, though the company had wrongfully refused to make the transfer. In re Argus Printing Co. (N. D.), 48 N. W. 347. As to a director ceasing to be a stockholder and continuing to act, see San Jose, etc., Bank v. Sierra Lumber Co., 63 Cal. 179. One to whom unregistered transfer had been made held eligible. State v. Smith, 15 Or. 98; 15 P. 386. A person having acted as one of the trustees of a corporation with the knowledge and consent of stockholders, the latter were held to be estopped from questioning his eligibility for the purpose of defeating a petition for the dissolution of the corporation on the ground that it was not signed by a majority of the trustees as required by statute. In re Santa Eulalia S. M. Co., 51 Hun, 640; 4 New York Supp. 174. Relator was elected a manager at a meeting at which there was not a majority of the managers, and was afterwards deposed, and brought *mandamus* to be restored. *Held*, that the fact that relator was elected secretary of the board, a position to which a manager only was eligible by the by-laws, could not legalize his election as manager. People v. New York Infant Asylum, 122 N. Y. 190; 25 N. E. 241.

Directors are often required by statute to be residents of the state where the corporation is created.[1]

§ **417. Directors de facto.**—Persons though disqualified may bind the corporation as *de facto* directors. Within the scope of their authority, they have the same authority while in office as directors *de jure*.[2]

§ **418. Acceptance of office.**—In the absence of an express declaration or any statute or controlling usage to the contrary, one elected a director is presumed to accept.[3] A long-continued neglect, however, to perform any duty as a director is equivalent to an abandonment of the office.[4]

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1 An alien who had for many years been a resident and property holder in Penn. may be legally elected a director, if not expressly made ineligible by the charter. Com. v. Detwiler Com., 131 Pa. St. 614; 18 A. 990. In Oregon a minority of directors in canal and railroad companies are allowed to be non-residents. State v. Smith, 15 Or. 98. Where a constitutional provision required "a majority of directors of any railroad corporation non-incorporated or hereafter to be incorporated by the laws of this state" to be citizens of Illinois, it was held that upon the consolidation of a domestic with a foreign railroad corporation under subsequent concurrent acts of the legislature of that and other states, the constitutional provision did not apply to the consolidated corporation. Ohio & M. Ry. Co. v. People, 121 Ill. 483; 14 N. E. 874.

2 Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; Rockville Turnp. Road v. Van Ness, 2 Cranch C. C. 449; Ellis v. N. C. Inst., 68 N. Car. 423. Under a statute requiring directors to be stockholders, a director who had sold all his stock, and had been superseded at a special stockholders' meeting held pursuant to notice, was decided not to be even a *de facto* director. Beardsley v. Johnson, 121 N. Y. 224; 24 N. E. 380. Persons are not entitled to recognition as directors *de facto* who claim at a meeting irregularly called and illegally conducted, and against another board holding over by virtue of a previous election, about which no question is raised. Ellsworth, etc., Mfg. Co. v. Faunce, 79 Me. 440; 10 A. 250. See In re Santa Enfalia S. M. Co., 4 N. Y. S. 174.

3 Lockwood v. Mich. Nat. B'k, 9 R. I. 308; Nimmons v. Tappan, 2 Sweeney, 652. Contra, Blaker v. Bayley, 16 Gray, 531.

4 Orr. Water Ditch Co. v. Reno Water Co., 17 Nev. 166. In this case respondent, the Reno W. Co., had sold all its property and closed up its affairs in March, 1876, and though its directors did not resign, they did not act as trustees, or do any corporation business until June and July following, when a majority

§ **419. Term of office.**—The period of incumbency of directors is generally fixed by statute or in the by-laws, or both. Where no term of office is prescribed, they hold until resignation or death, or their authority is revoked by action of the members, duly assembled. Until their successors are duly elected and qualified they are officers *de jure.*[1]

§ **420. Express powers.**—The powers contained in the articles or act of incorporation, general laws and by-laws must be considered in the light of so many delegations of authority in the nature of powers of attorney, and the general principles applicable thereto apply here. Where their powers are thus specifically defined, they cannot claim, in respect to them, the liberal common law powers of directors;[2] nor can they where they are thus limited enact any by-laws enlarging their authority,[3] In all matters concerning which their authority is not circumscribed, they may exercise all the powers of the corporation by virtue of its constating or incorporating instruments, and in addition thereto, those conferred in the by-laws and those implied from the nature of the duties devolving upon them.

They are the agents of the corporation; that is to say, when acting as a board, their province and office

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of them met and allowed on account, and drew a check for the amount in favor of appellant (the Orr. Ditch Co.), it was held in an action to enforce this claim against the stockholders of the Reno Company, that at the time this check was drawn, the persons claiming to be trustees and officers of the Reno Company were not such, either *de jure* or *de facto* and the corporation could not be held liable for their act.

[1] See Nathan v. Tompkins, 82 Ala. 437; 2 So. 747; Cassell v. L. H. & P. Tp. R. Co. (Ky.), 9 S. W. 701; Post Express Pr. Co. v. Coursey, 57 Hun, 585; 10 N. Y. S. 497. Merely selling all his stock and informing the secretary that he ceased all connection with the corporation, held not to constitute resignation. Chemical Nat. Bank v. Colwell, 29 N. Y. St. Rep. 729; 9 N. Y. S. 285–8.

[2] Fleckner v. B'k of U. S., 8 Wheat. 338.

[3] Wilson v. Myers, 10 C. B. (N. S.) 348; Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Smith, 2 Cow. 579.

is that of a collective agent. Under their expressly delegated authority, they may do whatever a liberal construction of the terms of the instruments conferring it allow. Such instruments are liberally construed in favor of the directors, but with due consideration for the best interests of the corporation.

Where the general powers of a corporation are entrusted to the directors, they may, unless restricted, do whatever the corporation itself might do, and by virtue of such general powers may sell all the corporate property.[1] But unless expressly authorized by law to do so, they have no right, even under such general authority, to dispose of the corporate franchises.

Under statutes vesting them with all the corporate powers, it is held that they constitute the corporation for all purposes of dealing with others. "Being the mind and soul of the corporate entity, what they do as its representatives the corporation itself is deemed to do."[2]

§ **421. Statutory prohibitions and limitations.**—Prohibitions are usually designed and framed for the protection of shareholders as well as the public, and directed against the declaration and payment of dividends and contracting of indebtedness, and making reports not justified by the financial condition of the corporation.[3]

§ **422. By-laws made by.**—General statutes and charters

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[1] See Wood v. Bedford, etc., R. R. Co., 8 Phil. (Penn.) 94; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; People v. P. & T. of C. 38 Cal. 166; Martin v. Zellerbach, Id. 318. Compare Abbott v. Hard Rubber Co., 33 Barb. 579. "The directors are competent to make any contract necessary or proper to enable the corporation to accomplish the purposes of creation; its expediency is a matter for their sole determination, and, if they act in good faith, their contracts are valid." Park v. Grant Locomotive Works, 40 N. J. 30, 114; 3 A. 162.

[2] Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48.

[3] For a further discussion of statutory prohibition and liabilities, infra, Ch. XXXIII.

often provide that the members at a corporate meeting may, by the same vote or by the same method as that by which they may enact a code of by-laws, confer authority to amend and repeal them and enact additional by-laws upon the directors.

The power may, at any time, be revoked by the same power and by the same majority as that by which it was delegated, notwithstanding a provision in the original resolution to the contrary.[1]

While vested with general authority to enact by-laws, the directors may adopt such as they deem proper within the powers of the corporation, and subject to no other limitations than those imposed on the latter by the general law or in the constating instruments. But the corporation may limit the authority it confers upon directors to enact by-laws, and in that case their scope of authority will be still further narrowed;[2] and, if they accept office under a contract regulating the disposition of profits, they can dispose of them only as directed by the contract.[3]

§ **423. Implied powers.**—In addition to the express powers conferred upon directors by the articles, by-laws and general laws, there are others derived by necessary implication therefrom. When not expressly prohibited, or the power is not delegated to others or reserved to the shareholders, directors may do any act in furtherance of the ends of the corporate creation.[4] They may

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1 Smith v. Nelson, 18 Vt. 511.

2 Stevens v. Davidson, 18 Gratt. 819. A majority of the directors of such number as constitutes a quorum must concur in adopting or enacting by-laws, as in other matters. Wilcock's Case, 7 Cow. 402; Cahill v. Kalamazoo Ins. Co., 3 Mich. 124, supra.

3 Park v. Grant Locomotive Works, 40 N. J. Eq. 114.

4 Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48; Ry. Co. v. Allerton, 18 Wall. 233; Bank of Middlebury v. Rutland, etc., Ry. Co., 30 Ver. 159; Smith v. Poor, 3 Ware, 148; Wright v. Oroville M. Co., 40 Cal. 20; Bedford Ry. Co. v. Bowser, 48 Pa. St. 29.

fix the salaries of the officers and agents.[1] From the very nature of the general authority to represent and act as the corporation, by far the greater part of their powers are implied. Being general agents, subject only to the restrictions and limitations imposed by the fundamental law of its creation, they have a very wide range of discretion in the choice of means and agencies for the accomplishment of its main objects. But they possess no powers by implication not necessary for an economical and successful prosecution of the purpose of the institution, nor can they divert their efforts or its capital to enterprises not comprehended within the terms of its constating instruments.

On account of the vast increase in the number of corporations and purposes for which they are formed in this country, and the necessity for the exercise by their officers and managing boards of wide discretionary powers, courts of the present period incline to deal with them very liberally, both in construing their express, and in granting their implied, authority. In doing so, they have to a certain extent relaxed the former rule on this subject. At an earlier period, they were reluctant to concede powers to the directors beyond a strict construction of the charter and by-laws.[2]

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[1] Waite v. Windham County Min. Co., 37 Vt. 608. See also, St. L. F. S. & W. R. Co. v. Tierman, 37 Kan. 606; 15 P. 544; Stewart v. St. L. Ft. S. & W. R. Co., 41 F. 736; holding that compensation may be fixed and allowed long after the services were rendered and without a previous contract of employment. Archer v. People's Sav. B'k, 88 Ala. 249; 7 So. 53; Eq., etc., Assn. v. Fisher. 71 Md. 430. But there must be either a contract or acceptance of the services rendered. Mather v. Eureka Mower, Co., 118 N. Y. 629; 23 N. E. 993.

[2] Whitewell v. Warner, 20 Vt. 425. See also Augusta Bank v. Hamblett, 35 Me. 491; Dispatch Line, etc., v. Bellamy, Mf'g Co., 12 N. H. 225; Bank of Middlebury v. Egerton, 30 Vt. 182; Miller v. Rutland, etc., Ry. Co., 36 Vt. 425; Hoyt v. Thompson, 19 N. Y. 207; Gordon v. Preston, 1 Watts, 385; Shaver v. Bear River & Auburn Water & Min. Co., 10 Cal. 396; People v. La. Rue, 67 Cal. 526; Cal. State Tel. Co. v. Atl. Tel. Co., 22 Cal. 398, 621; Parker v. Bernal, 66 Cal. 112; 4 P. 1090, Sullivan v. Triunfo, G. & S. Co., 29 Cal. 586;

§ **424. How powers may be exercised.**—Where the corporate powers are committed to the board the directors cannot act as such except when assembled as a board.[1] If authorized to do an act by the board, a director has only the authority of any other agent similarly authorized.[2]

The directors may act as a board at a regular meeting, if the prescribed quorum is present, whether there has been any call for a meeting or not.[3] But it would

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Cashwiler v. Wills, 33 Cal. 11; Bliss v. Kaweah, C. & C. Co., 65 Cal. 502; Selley v. San Jose, J. M. & B. Co., 59 Cal. 22; Donohoe v. Mariposa, V. & M. Co., 66 Cal. 317; 5 P. 495; Pixley v. W. P. R. R. Co., 33 Cal. 191; Moxey v. Thurman, 50 Cal. 320; Crowley v. Genessee, Min. Co., 55 Cal. 273; Winans v. Sierra, Lumber Co., 66 Cal. 61; 4 P. 952; Reno Water Co. v. Leete, 17 Nev. 203; State v. Glenn, 18 Nev. 35; 1 P. 186; Sutro Tunnel Co. v. Seg Belcher M. Co., 19 Nev. 121; 7 P. 271.

[1] Besch v. Western C. Mfg. Co., 36 Mo. App. 333, though owning majority of stock. Filon v. Miller Brewing. Co., 15 N. Y. S. 57 (Aug. 1891), Allemong v. Simmons, 124 Ind. 199; 23 N. E. 768; Florida M. & G. R. Co. v. Vanedoe, 81 Ga. 175; 7 S. E. 429; 4 Cal. 147; 33 Cal. 11; 38 Cal. 590; 46 Cal. 355; 52 Cal. 192; 55 Cal. 364; 59 Cal. 225; 65 Cal. 328, 502; Hillyer v. Overman S. M. Co., 6 Nev. 51. Compare Longmont S. D. Co. v. Coffman, 11 Colo. 551; 19 P. 508. Directors of national banks can act only as a unit and when assembled as a board. First Nat. B'k v. Drake, 35 Kan. 564; 11 P. 445. In New Jersey, directors of a corporation cannot vote at a directors' meeting by proxy. Craig Medicine Co. v. Merchants' Bank, 14 N. Y. S. 16. It seems that the corporation is bound if all the stockholders separately assent. Wood v. Wiley Cons. Co., 56 Conn. 87; 13 A. 137.

[2] Waite v. Windham Co. Min. Co., 36 Vt. 18.

[3] D'Arcy v. Tamar, etc., R. R. Co., L. R. 2 Exch. 158; Crane v. Bangor House Proprietory, 12 Me. 354; Leavitt v. Oxford, 3 Utah, 265; Buell v. Buckingham, 16 Ia. 284. Where five of seven directors designated by the act of incorporation became disqualified to serve as such, the two remaining directors cannot fill the five vacancies thereby occasioned. Moses v. Tompkins, 84 Ala. 613; 4 So. 763. But where an election is held for a board of seven directors of a corporation created under the Pennsylvania act of 1874, at which the cumulative plan of voting is employed, and five only, composing a legal quorum, of the candidates received a plurality of votes, such election is valid as to the five directors so chosen. Wright v. Commonwealth, 109 Pa. 561; 1 A. 794.

Where a majority of the whole board regularly assembled are given power to act, a majority of a quorum present may bind the corporation. Foster v. Mullanphy, P. M. Co., 92 Mo. 79; 4 S. W. 260. See Wallace v. Walse, 52 Hun, 328; Rollins v. Shaver W., etc., Co., 80 Ia. 380; 45 N. W. 1037. In Leavitt v. Oxford, supra, the court say: "Where the articles of association are silent as to what number of the directors shall constitute a quorum, the major part of the board constitutes a quorum,—a majority of which may decide any question in

open the door to the grossest frauds and abuses of authority, if it were to be conceded that a bare quorum of the board of directors could hold other than stated regular meetings, transact business and bind the corporation and its stockholders by their proceedings; and it is well settled that due notice of special meetings to each and every director cannot be dispensed with.[1]

§ **425. Place of meeting immaterial.**—The directors are not the corporation itself, but simply its officers and agents, and consequently their place of meeting is not important. In the absence of a provision to the contrary, contained in statutes or by-laws, they may hold meetings out of the state as well as in it. But less

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which they have power to act. The board of directors is the dominant body of the company; their power is not a delegated authority like that of ordinary agents, and they have the right to appoint one or more of their number to transact any legitimate business before them."

[1] See Ogden v. Murray, 39 N. Y. 207; Kersey Oil Co. v. Oil Creek, etc., R. Co., 12 Phil. 374; Doyle v. Mizner, 42 Mich. 332; 3 N. W. 968; Thompson v. Williams, 76 Cal. 143; Budd v. Walla Walla P. Co., 2 Wash. 347; 7 P. 896, holding that when the meeting is not a stated meeting it is not essential that proof or recital of notice appear on the face of the record of the proceedings but it may be shown *aliunde;* also that the person who presides over a meeting of the board may also be the clerk of the meeting; Herrington v. Liston, 47 Ia. 11; Staystown, etc., Turnp. Co. v. Craver, 45 Pa. St. 386; Corn Exch. Bank v. Cumberland Coal Co., 1 Bosw. 436; Met. T. & T. Co. v. Dom. T. & T. Co., 44; N. J. Eq. 568; 14 A. 907; Commeyer v. United, etc., German Ch., 2 Sandf. Ch. 187; Harding v. Vandewater, 40 Cal. 78; Schromm v. Seymour, 24 N. J. Eq. 412; D'Arcy v. Tamar, etc., Ry. Co. L. R. 2 Ex. 158. But where there is a common law quorum present at a meeting of the board there is a presumption that due and legal notice was given unless the contrary appears. Leavitt v. Oxford, etc., Min. Co., 3 Utah, 265; 4 Am. & Eng. Corp. Cas. 234; Chouteau Ins. Co. v. Holmes, 68 Mo. 601. But where after a special meeting held without legal notice a special meeting is held upon legal notice, and at a subsequent regular meeting the minutes of both the special meetings are read and approved, the irregularity pertaining to the first special meeting is thereby cured. County Ct. v. O. C. R. Co., 35 F. 161.

[2] Ohio, etc., R. Co. v. McPherson, 35 Mo. 13; Arms v. Conant, 36 Vt. 744; Smith v. Alvord, 63 Barb. 415; Bellows v. Todd, 39 Ia. 209; Saltmarsh v. Spaulding, 147 Mass. 224; 17 N. E. 316; McCall v. Bryan Mfg. Co., 6 Conn. 428; Bassett v. Monte Cristo, etc., Co., 15 Nev. 293. And the minutes of such meeting are evidence of their acts as a board. Wood Hydraulic, etc., Co. v. King, 45

than a majority cannot adjourn a meeting to another than the regular place of meeting.[1] Where the action of the directors as a board is required, a meeting should be called; and simply obtaining the assent of a majority to an act at separate interviews is not sufficient.[2] Separate assent of the members may, however, amount to a presumptive proof of concurrence of the board, in favor of a stranger.[3]

§ **426. Stockholders cannot interfere.**—When acting as a board within the scope of their authority, however conferred, their acts are binding on the corporation, and all its legitimate business may be transacted by them without the express sanction of the stockholders. The latter have no right to interfere with management by the board. Courts will not, even on the petition of a majority, compel the directors to do an act contrary to their judgment.[4] It is within the province of the board to declare dividends, and it requires a strong case to induce courts to interfere with the exercise of its discretion in that matter, in the absence of an improper or corrupt motive.[5] It has been held that, in the absence of statutory direction, the board may make an assignment of the property of the corporation for the benefit of creditors, and without the express authority or consent of the stockholders.[6]

Ga. 34. Where the stockholders of a corporation met out of the state and passed a resolution to issue bonds which was carried into effect by the board of directors their act was held binding upon the corporation although the stockholders, meeting was illegal, because the directors had authority to mortgage the property and issue bonds without such resolution. Thompson v. Natchez, Mfg. Co. (Miss.), 9 So. 821.

[1] State v. Smith, 48 Vt. 266.

[2] D'Arcy v. Tamar, etc., R. R. Co., L. R. 2 Exch. 156; Marcus v. Hannibal, etc., Plank Road, Co., 26 Mo. 102.

[3] Tenney v. East Warren Lumber Co., 43 N. H. 343.

[4] Infra, § 621.

[5] State v. Bank of La., 6 La. 745; Ely v. Sprague, Clarke Ch. 251; Infra, § 621.

[6] Dane v. Bank of U. S., 5 Watts & Serg. 223; De Camp v. Alward, 52 Ind.

§ **427. Have no power to dissolve the corporation.**—Boards of directors have no power to dissolve the corporation, except when so authorized by the stockholders. Their duties and powers in the event of a resolution of stockholders to wind up the affairs and put an end to its existence are, as in the case of insolvency, generally prescribed by statute.

Pending proceedings and after dissolution, until all debts are paid and the property distributed, they continue to be trustees for stockholders and creditors.[1] Where they exercise the general corporate powers, the act of dissolution must proceed from the directors, who alone can exercise the corporate powers.[2]

§ **428. Their double relation.**—The true relation sustained by directors to a corporation, and to its members and creditors, has often been misconceived. In fact they are clothed at the same time with a double character, that of trustees, and that of collective agents; and it is often of the utmost importance to discriminate between these two relations.[3]

Although directors undoubtedly stand in the position of agents and cannot bind their companies beyond the limits of their authority, they also stand in some degree in the position of trustees. There is no inconsistency in this double view of the position of directors. As agents they cannot bind their companies beyond their powers. As trustees, they must subserve the interests

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468; Chase v. Tuttle, 55 Conn. 455; Pyles v. Riverside Furniture Co., 30 W. Va. 123; 17 Am. & Eng. Corp. Cas. 102, 123; Hutchinson v. Green, 91 Mo. 367; Powers v. Hamilton Paper Co., 60 Wis. 23; Paulding v. Chrome Steel Co., 94 N. Y. 334; Planters' Bank v. Whittle, 78 Va. 734; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Fecheimer v. Nat. Ex. B'k, 79 Va. 80; Eppright v. Nickerson, 78 Mo. 482.

1 Infra, Ch. XXXVII.

2 Willamette, etc., Co. v. Kittredge, 5 Saw. 44.

3 Hun v. Cary, 82 N. Y. 65; Kelley v. Greenleaf, 3 Story, 93.

of their *cestui que trustent* rather than their own, and faithfully account for the trust fund, and are entitled to indemnity for losses and expenses incurred in the performance of duties within the limits of their trust.[1] "From their function of agency are derived their powers to act for the corporation as a legal entity; it measures the extent of these powers in the management of both the external and internal affairs; it fixes the rights and obligations of the corporation in dealings with stockholders and with third persons. The rights, duties, liabilities and remedies which result from the director's agency are, therefore, chiefly legal; the equitable rights, duties and remedies are mainly referable to the trust element of the directors' functions."[2]

§ **429. Fiduciary relation.**—A controlling board of properly qualified persons having been duly elected, they become agents and representatives, not of the shareholders, but of the corporation, and hold the relation and assume the responsibility to the members of trustees. As such trustees, they are not allowed to derive an advantage or benefit not shared in by every member, in proportion to his interest.[3]

This fiduciary obligation is implied in the acceptance of the trust, that they will not employ the corporate capital or franchises to promote their own private interests or that of third parties, but that of all the stockholders.[4] An agreement between a director and

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[1] Ex parte Chippendale, 4 De G. M. & G. 19, 52.

[2] Pomeroy's Eq. Jur., 1089.

[3] U. S. Rolling Stock Co. v. Atlantic, etc., R. R. Co., 34 O. St. 450; Corbett v. Woodward, 5 Saw. U. S. C. C. 403. See European & N. A. R. Co. v. Poor, 59 Me. 277; Pearson v. Concord R. Corp. 62 N. H. 537; Keith & Perry Coal Co. v. Bingham, 97 Mo. 196; 10 S. W. 32; Rudd v. Robinson, 54 Hun, 339; 7 N. Y. S. 535; Brewer v. Boston Theater, 104 Mass. 378.

[4] Smith v. Los Angeles I. & L. Co-op. Ass'n, 78 Cal. 289; 20 P. 677; Cumberland Coal Co. v. Parrish, 42 Md. 598; Averill v. Barber, 53 Hun, 636; 6 N. Y. S. 255; Hancock v. Holbrook, 40 La. Ann. 53; 3 So. 351; Hale v. Republican

a third party whereby the former is to use his vote and influence to the disadvantage of the corporation, and in the interest and for the benefit of third parties, is an immoral and corrupt contract and will not be enforced.[1]

§ 430. Strict accountability for ultra vires expenditures.—It is important, with respect to the personal liability of directors in dealings with corporate funds, to distinguish between their acts within and those without the powers of the corporation. If the purpose for which a misapplication was made be so outside the powers that the company could not sanction the transaction, they are personally liable to the extent of the fund so appropriated as for breach of trust; but if they apply the money of the company or exercise any of its powers in a manner which is not *ultra vires*, then a strong and clear case of misfeasance must be made out, to render them liable for a loss thereby occasioned to the company.[2]

Bridge Co., 3 Kan. 466. But the fiduciary relation cannot be set up to affect the right of a third party in no way implicated in a breach of trust, though such third party be a near relation of the derelict director. Rollins v. Shaver W. & C. Co., 80 Ia. 380; 45 N. W. 1037. Such transactions are not void but only voidable; hence may be ratified by the shareholders. Battelle v. N. C. & C. P. Co., 37 Minn. 89; 33 N. W. 327.

1 Attaway v. Third Nat. Bank, 93 Mo. 485; 5 S. W. 16; Atlee v. Fink, 75 Mo. 100; Bent v. Priest, 86 Mo. 476; Bliss v. Matterson, 45 N. Y. 22; Tobey v. Robinson, 99 Ill. 223; Harrington v. Vict. G. D. Co., 47 L. J. (N. S.) 594.

2 In re Faure Electric Accumulator Co., L. R. 40 Ch. Div. 141. In this case it was held that the payment of brokerage or commission to a stockbroker for placing a company's shares was an improper application of its capital and so not authorized even by a memorandum of the association to do whatever may be "conducive to" the specified objects of the company. See Patterson v. Stewart, 41 Minn 84; 42 N. W. 926, holding that the fact that the affairs of the company have been placed in the hands of a receiver neither takes away or suspends a creditor's right of action against the directors; also that he is not required to first obtain judgment against the corporation. Met. El. Ry. Co. v. Kneeland, 120 N. Y. 124; 24 N. E. 381. Not entitled after recovery against them to contribution from other shareholders. Heald v. Owen, 79 Ia. 23; 44 N. W. 210. Not liable to creditors for mere mismanagement. Kraft-Holmes, etc., Co.

§ 431. Unwarranted payment of dividends.—Analogous to *ultra vires* expenditures generally are disbursements of corporate funds to themselves and other shareholders in the form of dividends, when the financial condition of the corporation does not warrant the same. The statutory personal liability of directors in such cases is elsewhere considered;[1] but for fraudulent abuse of the right to declare and pay dividends, an action will lie in favor of injured creditors, in the absence of statutes on the subject.[2] In order to hold them liable personally to the full extent of such unwarranted disbursements and impairment of the capital, bad faith or gross negligence amounting to fraud in not informing themselves of the true financial condition of the corporation, must be shown.[3] There is no doubt of their personal liability

v. Crow, 36 Mo. App. 288; unless the mismanagement be gross and willful. Camp v. Taylor (N. J.), 19 A. 968.

[1] Infra, Ch. XXXIII.

[2] They are undoubtedly liable in such cases to refund as shareholders. Main v. Mills, 6 Biss. 98; Rance's Case, L. R. 6 Ch. 104. Compare In re Dunham, etc., Co., L. R. 25 Ch. D. 752, holding that a director was not bound to refund, it appearing that he did not participate in the fraudulent making out of the balance sheet from which that dividend was declared, and the extraordinary powers in that respect were vested in the chairman, who was responsible for it.

[3] In Osgood v. Laytin, 3 Keyes (N. Y.), the court said:—" Ignorance of the fact that it was the duty of the managers to know—not to know which was gross ignorance—cannot excuse the managers and impart any virtue or validity to acts otherwise clearly illegal, and which were a palpable fraud upon the creditors. But in Excelsior Petroleum Co. v. Lacy; Stringer Case, L. R. 4 Ch. 475; Jones v. Johnson, 86 Ky. 530; 6 S. W. 582; U. S. v. Harper, 33 F. 471; Appeal of Warner (Pa.), 7 A. 216; and in Witters v. Sowles, 31 F. 1, the directors were held not liable, no bad faith being shown. A different view was taken, however, in the case In re Oxford, etc., Soc., 55 L. T. Rep. 598, where the innocent intent of directors was held to be no defence. The entire assets of an insurance company were transferred to another company, in violation of law, and during such transfer a large sum of money was withdrawn from the treasuries of both companies to procure loans in order to perfect the transfer, thereby impairing the capital of both companies and injuring creditors and policy-holders. It was held, that a director of both companies at the time of the withdrawal of the funds was liable for the waste of the assets, at the suit of a receiver of the company whose assets were transferred; and the fact that the transfer was made on the advice of counsel was no protection. Pierson v. Cronk, 13 N. Y. S. 845.

where the dividend is wilfully and knowingly paid out of the capital.[1] The payment of dividends out of capital being *ultra vires* is incapable of ratification by the shareholders; and in an action by creditors to compel the directors to refund the latter, cannot set off any money due them from the company; nor have they any recourse to shareholders who innocently of knowledge of fraud took the dividends.[2] But in England it seems that in the absence of fraud in making the payment directors who have been compelled to pay indebtedness to creditors of the corporation may compel contribution from other shareholders.[3]

§ 432. **Diligence required.**—The measure of care and diligence required of directors is generally held to be such as a prudent man exercises in his own affairs.[4]

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1 In re Alexandra Palace Co., L. R. 21 Chan. Div. 149; Gratz v. Redd, 4 B. Monr. 178, 194; Salisbury v. Metro. Ry. Co., 22 L. T. (N. S.) 839; In re National Funds, etc., Co., L. R. 10 Ch. D. 118; Hill v. Frazier, 22 Pa. St. 320; Flitcroft's Case, L. R. 21 Chan. Div. 519; Evans v. Coventry, 8 De G. M. & G. 835; Burnes v. Pennell, 2 H. L. Cas. 497, 531. Tarquand v. Marshall, L. R. 4 Chan. 376.

2 In re County Marine Ins. Co., L. R. 6 Chan. 104; Scott v. Eagle Fire Ins. Co., 7 Paige, 198; Re Exch. Banking Co., L. R. 21 Chan. D. 519.

3 In re Alexandra Palace Co., L. R. 21 Chan. D. 149; Salisbury v. Metrop. Ry. Co., 22 L. T. (N. S.) 839.

4 Horn Silver Min. Co. v. Ryan, 42 Minn. 196; 28 Am. & Eng. Corp. Cas. 657; Scott v. De Peyster, 1 Edw. Ch. 547. The directors of a bank, as trustees for depositors, are liable for injuries resulting from want of ordinary care and diligence, in permitting the bank to be held out to the public as solvent, when it is in fact insolvent. SHELDON, C. J., and CRAIG, J., dissent. Delano v. Case, 121 Ill. 247; 12 N. E. 676.

The directors of a national bank which has become insolvent by reason of losses caused by the discount, from time to time, of paper not properly secured, indorsed by a director who is a man of wealth and the largest stockholder in the bank, and in whom the other directors have reason to place confidence, cannot be held liable for the mere failure to discover the illegal transactions and to prevent such director from continuing therein. Movius v. Lee, 30 F. 298.

It is competent to consider the illegal course of conduct in which managers have engaged, when present with their associates, in order to deter-

What constitutes a proper performance of the duties of a director is a question of fact which must be determined in each case in view of all the circumstances. The character of the company, the condition of its business, the usual method of managing such companies, and all other relevant facts must be taken into consideration. No abstract reasoning can be of service in reaching a proper solution.[1] Diligence required of the director must be exercised to prevent loss and damage resulting from fraudulent acts and other misconduct of others, as well as about the prosecution of the enterprises of the institution.[2] Thus, a director

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mine whether such managers are liable for like illegal acts done by such associates in their absence. Dodd v. Wilkinson, 42 N. J. Eq. 647.

Bank officers are not liable for a mere neglect to sue notes, thus permitting them to become barred, without proof that they were solvent assets. Wallace v. Lincoln Sav. Bank (Tenn.), 15 S. W. 448.

A national bank having been organized, the promoter took 380 shares of stock in his own name, and procured the defendants to be directors, as well as a person to be elected cashier by them. The directors were not acquainted with the banking business. The proposed cashier was known to the directors at least by reputation, and was supposed by them to be competent and trustworthy, and of considerable experience in the business, and they had full confidence in his integrity and ability to take charge of the bank. The cashier acted as manager of the loan and discount business of the bank, and the directors merely as advisors, when applied to. The promoter of the bank knew, and the other stockholders were presumed to know, that the directors were wholly unused to the banking business. *Held*, that the directors were not liable for the acts of the cashier in violation of the banking law, done without their participation or knowledge. Clews v. Bardon, 36 F. 617.

1 Horn Silver Min. Co. v. Ryan, 42 Min. 196; Hun v. Carey, 82 N. Y. 79; Whart. Neg. 435. See also, Brinkerhoff v. Bostwick, 99 N. Y. 52; s. . 105 N. Y. 567; Schelter v. S. O. Imp. Co. (Or.), 24 P. 25; Cates v. Sparkman, 73 Tex. 619; 11 S. W. 846; Palmer v. Howes, 73 Wis. 46; 40 N. W. 46.

2 So held in a case where the directors of an insurance company permitted false statements to be officially made as to the condition of the company, whereby a party suffered damage. Salomon v. Richardson, 30 Conn. 360. See also, Overend, etc., Co. v. Gibb, L. R. 5 H. L. 480; Robinson v. Smith, 3 Paige, 322; 24 Am. Dec. 212; Pontchatrain R. R. Co. v. Paulding, 11 La. 41. Directors are bound to exercise reasonable diligence concerning the appointment and conduct of subordinates as in other matters. Williams v. McKay, 40 N. J. Eq. 25; 18 A. 824, holding also that where

has been held liable personally for the fraudulent action of the other members of the board, which he might have prevented by attending a meeting, but which, through his negligent inattention to his duties, he failed to attend.[1]

§ 433. Cannot serve their own interest at expense of the corporation.—Within the meaning of statutory provisions, in most of the states, directors cannot bind the corporation they represent by their action as such in matters wherein they have an interest adverse to its interests, however honest their motives or fair their conduct.[2]

They must, while representing the corporation, serve its members impartially.[3] Transactions whereby a

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the president and treasurer together made investments on securities not within the restriction of the charter, or not such as ordinarily prudent men would make in the transaction of their own business, without submitting them to the finance committee and securing its approval, they were primarily liable for losses occasioned thereby.

In an action against directors to hold them personally liable for defalcation of a cashier, the burden is on plaintiffs to show that the defendants were negligent in discovering the fraud. Savings Bank of Louisville's Assignee v. Caperton, 87 Ky. 306; 8 S. W. 885.

Managers of a savings bank are liable, if they participate in or promote the prohibited acts which lead to loss, or if they neglect to bestow on the affairs of the bank that measure of care which the law exacts of them, and in consequence their associates are enabled to do the acts causing loss. Dodd v. Wilkinson, 42 N. J. Eq. 647; 9 A. 685.

[1] Percy v. Millaudon, 3 La. 575; United Society v. Underwood, 9 Bush. 617; Brown v. Orr, 112 Pa. St. 233; 3 A. 817, the court saying: "If the directors of a corporation commit a wrong by misapplying money it is a wrong to the corporation as well as to the person entitled to the money; and, whatever may be the form of the proceeding to redress the wrong, the corporation must be made a party."

[2] Graves v. Mono Lake, etc., Min. Co., 81 Cal. 303; 22 P. 665. See also, Andrews v. Pratt, 44 Cal. 309; San Diego v. S. D. & L. A. R. R. Co., 44 Cal. 106; Wilber v. Lynde, 49 Cal. 290; 19 Am. Rep. 645; Chamberlain v. Pacific Wool Co., 54 Cal. 103; Tracy v. Colby, 55 Cal. 67; Wardwell v. Union Pacific R. R. Co., 103 U. S. 651; Kochler v. Black River Falls Iron Co., 2 Black. 715.

[3] Chase v. Vanderbilt, 62 N. Y. 307; Mahoney Minn. Co. v. Bennett, 5 Saw. 141. But the director must not take advantage of his position to

director secures an advantage to himself over other stockholders are voidable in equity.[1] No officer or director is allowed by his dealings to create an antagonistic relation between himself and the property of the corporation, or to do that for himself which it is his duty to do for his principal and beneficiary.[2] But it

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secure a preference. Under the Maine insolvency law the adjudication of a petition against an insolvent debtor takes effect from the day of the filing of the petition, and the validity of all transfers of property by the debtor is to be determined by reference to that date. Clay v. Towle, 78 Me. 86; 2 A. 852; holding also that it is the duty of a director to know the financial condition of his corporation; and a mortgage given by an insolvent corporation to a director, to secure an existing debt, is presumed to have been given in fraud of the insolvent law, and if made within four months of the filing of the insolvency petition is void.

See Sandy Riv. R. Co. v. Stubbs, 77 Me. 594; 2 A. 9, where a director was held under the circumstances not to be a trustee for the company with respect to a purchase by him as such.

[1] Corbett v. Woodward, 5 Saw. U. S. C. C. 403; Farmers' & Merchants' Bank v. Downey, 53 Cal. 466. See also Washburn v. Green, 133 U. S. 30, 49. But such transaction may by subsequent ratification of stockholders become binding on the corporation. Stewart v. St. L. H. S. & W. R. Co., 41 F. 736.

[2] Brewster v. Stratman, 4 Mo. App. 41; Davis v. Rock Creek, etc., M. Co., 55 Cal. 359; Cumberland Coal Co. v. Shuman, 30 Barb. 553; Barton v. Port Jackson, etc., Plank Road Co., 17 Barb. 397; Hoyle v. Plattsburgh, etc., R. R. Co., 54 N. Y. 314.

A purchase of lands from a corporation by one of the directors, at one-tenth of its real value, raises a presumption of fraud against him, and he must show affirmatively that the transaction was perfectly fair. Woodroof v. Howes (Cal.), 26 P. 111.

It appeared upon foreclosure proceedings that the bonds of a street car company, issued pursuant to a vote of the stockholders, "for the purpose of extending and constructing" the road, purchasing rolling stock and equipments, and paying "for labor done and to be done in the construction" and operation of the road, were never sold to procure funds for these purposes, but that after ineffectual attempts to sell them they were pledged by the president and vice-president of the mortgagor to secure antecedent indebtedness of the company, which to a large extent was due to other companies, of which also they were officers and directors. *Held*, that the pledge was without authority, and in fraud of the rights of the stockholders. Farmers' Loan & Trust Co. v. San Diego St. Car Co., 45 F. 518.

Where a director and superintendent, on behalf of the corporation, contracts with a third person for work and material, paying him an excessive price therefor, or reserving to himself individually a discount or commission, he is liable to account to the corporation. Perry v. Tuscaloosa Cotton Seed Oiling Co., 9 So. 217 (April 30, 1891).

seems that where the directors, with others, not stockholders, are creditors of an insolvent corporation, the former may avail themselves of any legal means, free from fraud, to give their claim the preference.[1] So the

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For able expositions of this doctrine see opinion of WAYNE, J., in Michaud v. Girod, 4 How. 555, and of Lord CRANWORTH in Aberdeen R. R. Co. v. Blakie; McQueen, 461 H. L. Cas. 461. Where one as director in two corporations sold property of one to the other to pay debts in good faith, realizing a profit to the selling corporation on the property sold, it was held that the stockholders of the latter had no cause of complaint. Mfg. Sav. B'k v. O'Reiley, 97 Mo. 38; 10 S. W. 865. See also, Barr v. N. Y., L. E. & W. R. Co., 52 Hun, 555; Davis v. Gennell, 70 Md. 356; 17 A. 259; Copeland v. Johnson, 47 Hun, 235; Schetter v. S. O. Imp. Co. (Or.), 24 P. 25; Ward v. Davidson, 89 Mo. 445; 1 S. W. 846; Martindale v. W. C. Co., 134 Pa. 348; 19 A. 680; Gainsboro & N. C. J. Tp. Co. v. Stratton, 120 Ind. 294; 22 N. E. 247; Ten Eyck v. R. R. Co., 74 Mich. 226; 41 N. W. 905; Burns v. Beck, 83 Ga. 471; 10 S. E. 121; Ashley v. Kinnan, 18 St. R. 791; 2 N. Y. S. 574; Beach v. Miller (Ill.), 14 N. E. 698. Treasurer does not occupy fiduciary relation with respect to claims against company purchased by him. St. L. Ft. S. & W. R. Co. v. Chenault, 36 Kan. 51; 12 P. 303; Directory entitled to reimbursement for advances made in good faith. Reed v. Hoyt, 109 N. Y. 659; 17 N. E. 418. See also Saltmarsh v. Spaulding, 147 Mass. 244; 17 N. E. 316; Co. Ct. v. B. & O. R. Co., 35 F. 161; Holt v. Bennett, 146 Mass. 439; 16 N. E. 5; Wasach Min. Co. v. Jennings (Utah), 16 P. 399; McMurty v. M. M. Temple Co., 84 Ky. 462; 5 S. W. 570.

In the case of Davis v. Rock Cr., etc., M. Co., 55 Cal. 359, where the president had secured demands against the corporation in his own name, he was not allowed to enforce them against the corporation, although it did not appear whether he had secured them at a discount or not. On this point, the court said the law permitted no inquiry into that question, but that occupying, as he did, the position of a trustee, he should not have put himself in a position adverse to his *cestui que trust*. See also, Pearson v. Concord R. Corp., 62 N. H. 537; Andrews v. Pratt, 44 Cal. 309; San Diego v. S. D. & L. A. R. R. Co., 44 Cal. 106; Wilber v. Linde, 49 Cal. 290; Graves v. Mono Lake Min. Co., 81 Cal. 303. Arkansas Val. Agr. Soc. v. Eichholtz (Kan.), 25 P. 613. Where, after a sale of corporate property, the officers and directors, without the knowledge or consent of the other stockholders, issued to themselves the remaining stock at par value, and then declared a dividend upon the entire stock issued, of $25 per share, it was held, that such action was without authority, in fraud of the rights of the other stockholders, and was a breach of duty upon the part of the officers of such corporation. A contract between the directors and a stockholder of a corporation, regarding the sale of stock, is not voidable by the latter on the ground of the trust relation between the parties, when a stockholder is also a director of the corporation, and has general charge of its business. Perry v. Pearson (Ill.), 25 N. E. 636.

[1] Eagle Woolen Mills v. Monteith, 2 Or. 277; App. of Neal, 129 Pa. 64; 18 A. 564; Phil., etc., R. R. Co. v. Love, 125 Pa. St. 488; 17 A. 455. Hopkins App., 90 Pa. St. 69. An attachment against an insolvent corporation by a creditor, who is one of its directors, though he has no control over its

president of an embarrassed corporation who had purchased its outstanding bond was allowed to hold and enforce it against the company.[1] Directors having in good faith advanced their money to pay the debts and preserve the property for the use of other stockholders, who have declined to join in making the advances to relieve the corporation, are entitled in equity to be subrogated to the rights of the creditors whose debts they have paid. And where the directors act in good faith on representations of authorized agents of the corporation, in borrowing money for its purposes, the lender, himself a director, is not bound to show that the money loaned was appropriated to the use of the corporation in order to establish an indebtedness against it.[2] Mem-

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assets, and though the proceeding is strictly hostile as between him and the corporation, isvoid under Rev. St. N. Y., pt. 1, c. 18, tit. 4, sec. 4, which prohibits a corporation which shall have refused the payment of any of its debts or any of its officers from assigning or transferring any of its property to any officer or stockholder, directly or indirectly, for the payment of any debt. Affirming 11 N. Y. S. 532. EARL, PECKHAM, and GRAY, JJ. dissenting. Throop v. Hatch Lithographic Co. (N. Y.), 26 N. E. 742.

[1] Bradley v. Williams, 3 Hughes C. C. 26.

[2] Borland v. Haven, 37 Fed. Rep. 394. See also, generally, Oil Co. v. Marbury, 91 U. S. 587; Hotel Co. v. Wade, 97 U. S. 13; Hallam v. Hotel Co., 56 Ia. 178; Harts v. Brown, 77 Ill. 226; Brimham v. Coal Co., 47 Pa. St. 43; Hope v. Valley Co., 25 W. Va. 789; Duncomb v. R. R. Co., 84 N. Y. 190; 88 N. Y. Harpending v. Munson, 91 N. Y. 650; Santa Cruz R. R. Co. v. Spreckles, 65 Cal. 193; 66 Cal. 51; Harts v. Brown, 77 Ill. 226. See Benefit Bldg. Soy. v. Cunliffe, 10 Am. & Eng. Corp. Cas. 459; In re Carriage Co-op. Sup. Ass'n, 6 Ib. 324. They may in such case take security for the loan, but may not use their position to obtain an undue advantage. Sutter & V. R. Co. v. Baum, 66 Cal. 44; 4 P. 916. Where directors advanced their money to redeem the corporate property from execution sale they were held to be mortgagees, not absolute owners of the property redeemed. Wasach Min. Co. v. Jennings (Utah), 15 Pac. Rep. 65.

Where directors discounted their individual note, to secure money for carrying on the corporate business, and took collateral security from the party with whom the dealing was had, it was held that they were entitled to a preference over other creditors out of the proceeds arising from the disposal of the collaterals. Appeal of Atchinson (Pa.), 11 Atl. Rep. 239. See also Street v. Old Town Bank of Baltimore, 67 Md. 421. In Budd v. W. W. P. P. Co., 2 Wash. Ter. R. 347; 7 P. 896, a trustee had a claim against the corporation for which, during

bers of a board of directors, who are necessarily shareholders, enjoy, like the other corporators, the right to dispose of their stock, and individually are amenable to no account therefor.[1]

§ **434. Termination of fiduciary relation.**—After an assignment by a corporation, for the benefit of its creditors, unless expressly made trustees for stockholders and creditors, and after the control of the corporation and its assets has passed out of their hands, the directors no longer occupy the relation of trustees, unless otherwise provided by statute, and may deal in its property and evidences of indebtedness as other persons.[2] It was held that under such circumstances a treasurer, who was also a director, having purchased debts owing by the corporation after assignment, was entitled to participate in the distribution of the fund.[3]

§ **435. Duty upon dissolution.**—Upon dissolution of a corporation, whether voluntary or involuntary, unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and

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his attendance at a meeting, the board gave the corporation a note. It was held that his presence and interest did not invalidate the act of the board, and that his note was valid. In Gardner v. Butler, 30 N. J. Eq. 702, VAN SICKEL, J., said: "The rule is that the trustee cannot fortify himself by a contract which he makes with himself or for his own benefit, and set it up either at law or in equity as a valid obligation. . . . . No claim which they make against their company can acquire any support or validity from the fact that they have expressly sanctioned it; it must rest exclusively upon its fairness and justice, and be enforced upon the *quantum meruit.*" The decision in Wilber v. Lynde, 49 Cal. 290, rests upon the principles thus announced by Justice VAN SICKEL. See also Graves v. Mono Lake, etc., Min. Co., 81 Cal. 303.

1 Trisconi v. Winship (La.), 9 So. 29.

2 Beach v. Miller (Ill.), 22 N. E. 404.

3 Appeal of Hammond, 123 Pa. St. 503; 16 A. 419. See also Craig's App., 92 Pa. St. 396. A sale to a director who resigns in order to make the purchase is voidable but not void. Searcy v. Yarnell, 47 Ark. 269; 1 S. W. 319.

stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation. The duties of directors as trustees with respect to the collection and distribution of assets among the members, and the settlement of debts, are substantially the same in case of proceedings to wind up a corporation's affairs as in case of insolvency.[1]

In case of forfeiture at suit of the state, it frequently happens that the directors are the parties who are guilty of the acts constituting the cause of forfeiture, and when that is the case, it might be highly improper to entrust them with the adjustment of the rights and interests of creditors and shareholders, who may be the parties who have instituted and prosecuted the *quo warranto* proceedings. Under such circumstances, the court should appoint a receiver to settle with creditors and make the collection and distribution of assets. A receiver, however, can only be appointed in that case upon proper application of creditors or stockholders.[2] Statutes providing that the directors or managers shall be trustees for the purpose of making distribution after dissolution seldom direct specifically how such distribution shall be made. Whatever may become necessary for the purpose of effectually and properly making it, must, according to well settled principles of construction, be included within the authority conferred by statute.[3] Upon the insolvency and assignment for the

[1] A corporation is dissolved within the meaning of the Ala. statute, relating to the personal liability of stockholders, when it makes an assignment for the benefit of creditors, and ceases to do business. McDonnell v. G. L. Ins. Co., 85 Ala. 401; 5 So. 120. See also, In re Sportsman's Ass'n, 15 Civ. Proc. R. (N. Y.) 215; People v. O'Brien, 111 N. Y. 1. See infra, § 842.

[2] Havemeyer v. Sup. Ct., 84 Cal. 327; 24 Pac. Rep. 121.

[3] Green v. The Mayor, 2 Hilton, 203, 209; People v. White, 59 Bard. 666; In re Woven Tape, etc., Co., 8 Hun, 508. The deed of trust of an insolvent corporation providing that the unpaid subscriptions shall be payable to the trustee, the right to collect the same passes thereby, and they may be enforced in a suit

benefit of creditors of a national bank the authority of its officers ceases.[1]

§ **436. Compensation.**—Directors are subject to the general rule governing trustees, which is, that in the absence of some provision to that effect in the by-laws or an express contract, they are not entitled to pay for the performance of official duties.[2] When officers have been chief promoters of a corporate enterprise, their interest in the stock and other incidental advantages justify a presumption that the promotion of their own interests is the motive for the exercise of official duties, and this presumption prevails until overcome by evidence of an express pre-arrangement for salary.[3] But

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for that purpose. Hamilton v. Glenn, 85 Va. 901; 9 S. E. Rep. 129. The board of directors of a corporation may authorize an assignment by a corporation under the Minnesota insolvency act of 1881 when the conditions specified in the act exist. Tripp v. N. W. Nat. B'k, 41 Minn. 400. See also Same v. Seeley 41 Minn. 404. After directors of a corporation have transferred all its property to a trustee for the purpose of securing creditors they have no right to continue the business nor can they authorize the trustee to do so. Kendell v. Bishop, 76 Mich. 634; 43 N. W. 645.

[1] Shrader v. Mngrs. Nat. B'k, 133 U. S. 67; Peters v. Bain, 133 U. S. 670.

[2] Loan Ass'n v. Stonemetz, 29 Penn. St. 534; Utica Ins. Co. v. Bloodgood, 4 Wend. 652; New York, etc., R. R. Co. v. Ketchum, 27 Conn. 170; State v. People's Mut. Ben. Ass'n, 42 O. St. 579; First Nat. B'k v. Drake, 29 Kan. 311; Hodges v. Rutland R. R. Co., 29 Vt. 220; Chandler v. Monmouth B'k, 8 N. J. Eq. 101, 255. But in Hedges v. Pacquett, 3 Or. 77, it was held that, if not prevented by the by-laws, directors may fix their own compensation. See also Grensboro & N. C. J. Tp. Co. v. Stratton, 120 Ind. 294; 22 N. E. 247. An attorney who was also a director and who rendered valuable services in both capacities was held entitled to recover reasonable compensation. Ten Eyck v. P. O. & P. A. R. Co., 74 Mich. 226: 41 N. W. 905.

[3] Kilpatrick v. Penrose Ferry Bdg. Co., 49 Pa. St. 118. See Citizens' Nat. B'k v. Elliott, 55 Ia. 104; Merrick v. Peru Coal Co., 61 Ill. 472; Cheney v. Lafayette, etc., R. R. Co., 68 Ill. 570; Burns v. Beck, 83 Ga. 471; 10 S. E. Rep. 121; In re Lafayette R. Co., 87 Ill. 446; Holder v. Same, 71 Ill. 106; Santa Clara Mfg. Ass'n v. Meredith, 49 Md. 389. The services of a director in efforts to form another corporation in another state in pursuance of an official arrangement between himself and the other directors, without any agreement as to renumeration and for general corporate advantage, were held not to entitle him to pay for the same. Eakins v. Am. White Bronze Co., 75 Mich. 568; 42 N. W. 982. See also Ellis v. Ward (Ill.), 25 N. E. Rep. 530.

a corporation may, by contract or by-law, provide for the compensation of an officer or director for life, or until dissolution of the corporation.[1] A distinction must be kept in view between those services purely official and those performed under contract or resolution of the board, employing and authorizing them as agents. In the latter case even though no compensation be stipulated for, the law will infer a contract on the part of the corporation to pay a reasonable sum.[2]

Services are often needed requiring mechanical skill, and if, in this case, the qualifications are possessed by a member of the board, there is no good reason why he should not be employed. So, it may happen that the business of the corporation requires attention at a long distance from the location of its principal business. In this case, it might also be very inconvenient and expensive for the whole board to attend. Under such circumstances as these, it is legal and proper that the board should constitute one of its members an agent, and compensate him for his services and necessary expense.[3] But where the services were strictly official, though extraordinary, and not provided for by contract or

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[1] People v. Globe Mut. Ins. Co., 91 N. Y. 174.

[2] Shackleford v. New Orleans, etc., R. R. Co., 37 Miss. 202; Rogers v. Hastings, etc., R. R. Co., 22 Minn. 25; Chandler v. Monmouth B'k, 1st Green (N. J.), 255; Lafayette, etc., R. Co. v. Cheeney, 87 Ill. 446; Jones v. Morrison, 1 Am & Eng. Corp. Cas. 313–326; Ward v. Davidson, 14 Ib. 73; Ten Eyck v. Pontiac O. & P. A. R. Co., 74 Mich. 226; Grensboro & N. C. J. Turnp. Co. v. Stratton, 120 Ind. 294. "One who has performed services for a corporation has a right of action against it, though he is one of its trustees." McDowall v. Sheehan, 13 N. Y. S. 386. The director of a construction company who acts as superintendent, treasurer and general manager, performing, with the knowledge of the company, services not pertinent to his office as director, can recover the reasonable worth of the services. Fitzgerald & Mallory Constr. Co. v. Fitzgerald, 11 S. Ct. 36. A general manager was allowed to recover compensation for services rendered where such services were defined in the by-laws. Kryger v. Ry. Track, etc., Co. (Minn.), 49 N. W. 255 (August, 1891).

[3] Chandler v. Monmouth B'k, 1 Greene (N. J.), 255.

resolution, it was held that the director performing them could not recover compensation.[1] And the board cannot, in such cases, by resolution or otherwise, create a debt against the corporation for past services.[2] A resolution of trustees voting pay to themselves for past services is void as a corporate act.

§ **437. President may be compensated.**—But directors may, by resolution, provide for pay of president pursuant to an understanding to that effect. He will not be entitled to recover for such services until the directors take the necessary action;[3] nor then if they do not act before the corporation is adjudged insolvent.[4] Such resolution may cover past services, and when properly recorded is a contract in writing.[5] Officers, the very

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1 Am. Cent. R. R. Co. v. Miles, 52 Ill. 174; Maux Ferry Gravel R. Co. v. Bramegan, 40 Ind. 361; Collins v. Godfrey, 1 Barn. & Ald. 590.

2 Loan Ass'n v. Stonemetz, 29 Pa. St. 534.

3 Barril v. C. I. & W. P. Co., 50 Hun, 257; 2 N. Y. S. 758; Martindale v. Wilson-Cass. Co., 134 Pa. St. 348. It was held that they can only act by resolution which must be adopted previous to the rendering such services, and that the president cannot recover on a resolution subsequently adopted. Ellis v. Ward (Ill.), 25 N. E. 530. Contra, Reed v. Hoyt, 109 N. Y. 659; 17 N. E. 418; Grundy v. Pine Hill Coal Co. (Ky.), 9 S. W. 414. Where the resolution of a corporation, appearing in the minutes, recites that the salary of the president shall be "fixed at the rates allowed during the past year, viz., $150," it is an admission by the directors that the salary was so fixed for the preceding year, and is competent evidence to prove that fact. Smith v. Woodville Con. S. M. Co., 66 Cal. 398; 5 P. 688.

4 McAvity v. Lincoln P. & P. Co., 82 Me. 504; 20 A. 82; Wood v. L. L. & C. Mfg. Co. (Or.), 23 P. 848. A contract may, however, be implied from circumstances. Bartlett v. Mystic Riv. Corp. 151 Mass. 433; 24 N. E. 780; Ind. E. R. & S. W. R. Co. v. Hyde, 122 Ind. 188; 23 N. E. 706. But there must be proof of services outside of mere official duties. Graves v. Mono Lake Min. Co., 81 Cal. 303.

5 Rosborough v. The Shasta R. C. Co., 22 Cal. 557. But see Ellis v. Ward (Ill.), 25 N. E. 530. In this case the president of a corporation, who had served without agreement as to pay, sold his stock to three persons, who thereby acquired control of the corporation, and made themselves directors. They then voted a sum of money to the president for his past services, and paid the money to him in part consideration for their stock. It was held that they were liable for said sum to the receiver of the corporation, since the president was not en-

nature of whose employment involves constant attention and labor, as in the case of business managers and secretaries, probably could recover reasonable compensation on a *quantum meruit*, even in the absence of a stipulation as to salary. The right to do so by agents other than officers has never been questioned.[1]

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titled to salary. Though a vote of the directors of a corporation fixing the treasurer's salary at a certain sum has been recorded in the minutes, in an action for such salary parol evidence is admissible to show that, at the time the vote was passed, it was understood that it was not to be binding unless negotiations then pending were successfully concluded, which would enable the corporation to comply with the terms of its charter, and to begin operations. Sears v. Kings County El. R. Co. (Mass.), 25 N. E. 98. Where plaintiff's complaint states a single cause of action, a debt due from a defendant corporation to plaintiff as holder and owner of bonds of the corporation, he cannot, having accepted the bonds as compensation for his services as president, recover the amount of his salary as such. Kirkland v. Kille, 99 N. Y. 390; 2 N. E. 36.

[1] It was held in the case of a director who also acted as treasurer that he was not entitled to compensation; but the court said if the services had been performed by a new stockholder or other person not connected with the directory, it would have been otherwise. Holder v. Lafayette, etc., R. R. Co., 71 Ill. 106; s. c. 22 Am. R. 89. See First Nat. Bank v. Darke, 29 Kan. 311. Acting as secretary after being elected to that position, though neither a director nor a stockholder, was held to raise a *prima facie* obligation upon the company to make compensation, and it was held unimportant that plaintiff omitted to present his claim for five years and until superseded, in the absence of clear evidence that the services were to be gratuitous. Smith v. Long Island R. Co., 102 N. Y. 190; 6 N. E. 397.

CHAPTER XVIII.

PARTICIPATION IN PROFITS.—DIVIDENDS.

§ **438. The main object.**—The main, and generally the sole, object in taking stock in a capitalized corporation is participation in the profits of the enterprise in the form of dividends.

§ **439. Dividends defined.**—The term dividend may mean either the aggregate fund out of which profits from a corporate enterprise are paid to the shareholders collectively, or it may mean the share of the fund apportioned to an individual stockholder. Thus we say

that a dividend has been declared by such and such a company, meaning that there is a sum derived from its business not needed for expenses to which the shareholders are ratably entitled ; and we speak of a shareholder being entitled to a dividend, by which we mean that he is entitled to a definite part of a certain profit fund.

In a larger sense a dividend is money paid out of profits by a corporation to its shareholders, whether the amount be great or small, or whether made at long or short intervals, regardless of the manner or place of payment.[1]

The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its charter, and to a like proportion of the property remaining upon the termination or dissolution of the corporation after payment of its debts.[2]

But a dividend representing profits and payable in cash or shares of increased stock is not a mere substitute for a stock dividend when the stockholder is at liberty to sell his right to subscribe for the new stock.[3]

Thus it is seen that the term "dividends" is not to be applied to the stockholders' share upon final distribution, but only to the surplus income ascertained

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1 Taft v. Hartford, etc., R. Co., 8 R. I. 33; Clarkson v. Clarkson, 18 Barb. N. Y. 657. The term dividend is used to signify something to be paid by corporations not insolvent. Scott v. Eagle Ins. Co., 7 Paige (N. Y.), 198; Karnes v. Rochester, etc., R. Co., 4 Abb. Pr. N. S. N. Y. 107; Gordon's Extra v. Richmond, etc., R. Co., 78 Va. 501. For other definitions see Penn. v. Erie, etc., R. Co., 10 Phila. Pa. 466; Bouv. Law Dict.; Williston v. Mich. etc., R. Co., 13 Allen (Mass.), 404; Osgood v. Laytin, 3 Keys (N. H.), 523.

2 Gibbons v. Mahon, 136 U. S. 549, per Justice Gray.

3 Davis v. Jackson (Mass.), 25 N. E. 21. Van Allen v. Assessors, 3 Wall. 573, 584; Delaware R. R. Tax, 18 Wall, 206, 230; Tennessee v. Whitworth, 117 U. S. 120, 136; New Orleans v. Houston, 119 U. S. 265, 277.

and paid from time to time in a live and going concern.[1]

§ 440. Meaning of "profits," "net profits," "net earnings," "surplus," etc.—The duties of directors in the first place, and the jurisdiction of a court of equity when appealed to by a shareholder after a breach of duties by them on a question of dividends, are generally determined by the definition attached to the term dividend in the given case.

Charters and articles of incorporation often empower or limit the power of directors to declare dividends, and direct that such dividends shall be paid only from a particular fund variously designated as "profits," "net profits," "net earnings," "surplus profits," or equivalent words. These terms have received construction by the courts from time to time.

"Profits" and "net earnings" are the terms most frequently used. They are convertible and denote the excess of receipts over expenditures.[2]

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1 Lockhart v. Van Alstyne, 31 Mich. 76.

2 Connelly v. Davidson, 2 Sneed. Tenn. 452. "Profits" and "net profits" are substantially synonymous expressions; but the aggregate returns are often called "gross profits," and what remains after deducting expenses "net profits." These different uses of the term have made it necessary to preserve a distinction. Lindley on Part., 15; Story, Part., sec. 23; Fuller v. Miller, 105 Mass. 103. Passing a resolution that "the report of the assessors of income tax of the profits of last year be made in the individual names of the stockholders and their respective amounts charged to their account when paid," does not constitute a division of the profits. Reading Fire Ins. & Trust Co. v. Reading Iron-Works (Pa.), 21 A. 170. Aside from this relative significance which usage has given it, the term "profits" means the gain which comes in or is received from any business investment when both receipts and expenditures are to be taken into account, People v. Supervisors, 4 Hill (N. Y.), 20, but it is not limited to what remains after the payment of every debt, but the excess of ordinary receipts over expenses properly chargeable to revenue account. Mills v. Northern Ry. of B. A. Co., L. R. 5 Ch. 621; Lee v. Neuchatel Co., L. R. 41 Ch. Div. 1; Birch v. Cropper, L. R. 14 App. Cas. 525. Depreciation of buildings in which a business is carried on, although original capital was invested in their erection, is not usually taken into account in estimating profits. Eyster v. Centennial Bd. of Fin. 94 U. S. 500.

The term "net profits" as applied to corporations is the sum remaining to be divided among the stockholders after discharging or providing for every outgoing expenditure properly chargeable against the period, whether long or short, for which the profits are to be calculated;[1] in other words, what remains as the clear gains of a business venture after deducting the capital invested, the expenses incurred in its conduct and the losses sustained in its prosecution.[2]

It would be difficult to distinguish between the literal meaning of "net profits" and "net earnings." But the latter term has been given a somewhat more restricted definition when applied to railroad management than in other enterprises. In a general sense the term denotes the gross receipts less the expenses of operation and management in earning such receipts.[3]

But courts have often required several other kinds of charges, such as interest on bonded indebtedness, to be taken into consideration and deducted before the payment of dividends from the fund.[4]

Within the meaning of an act relating to the dividends which savings banks were authorized to make, "surplus profits" were held to consist of earnings actually received.[5]

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1 Glazier v. Rolls, L. R. 42 Ch. Div. 453.

2 Park v. Grant Locomotive Works, 40 N. J. Eq. 114; 3 A. 162. Neither the legal nor any rate of interest is to be deducted. There may be net profits amounting to less than the legal rate of interest. Tutt v. Lang, 50 Ga. 339.

3 St. John v. Erie Ry. Co., 22 Wall. 146. See also, Bates v. Androscoggin R. Co., 49 Me. 491; Sioux City, etc., R. Co. v. U. S., 110 U. S. 205; Union Pacific R. Co. v. U. S., 99 U. S. 700; Barry v. M. K. & T. R. Co., 27 Fed. Rep. 1.

4 Belfast & M. L. R. Co. v. Belfast, 77 Me. 445; 1 A. 362; Chaffee v. Rutland R. Co., 55 Vt. 110; Taft. v. Hartford, etc., R. Co., 8 R. I. 310.

5 People v. S. F. Sav. Union, 72 Cal. 199; 13 P. 498. Compare Williams v. Western Un. Tel. Co., 93 N. Y. 162. Unearned premiums upon policies received by an insurance company are not surplus profits which the directors are authorized to distribute as dividends. Scott v. Eagle F. Ins. Co., 7 Paige, Ch. (N. Y.), 198.

§ 441. **Duty of directors with respect to dividends.**—It is to the interest of all creditors and the state, as well as of all solvent shareholders, that the property of a corporation shall be preserved intact to fulfil the purposes for which it was formed, and that it shall not be rendered insolvent by a division of its earnings when its financial condition does not justify it. Just what that condition is, is sometimes a difficult question to determine. The gross receipts constitute the general fund out of which expenses and net earnings are to be paid, and the first of these has the higher claim on the fund.

The injustice which it is the object of a statute forbidding dividends being paid from the capital stock or other funds of a corporation than the net earnings to prevent is too apparent to require elucidation.

The capital stock of a corporation, like that of a copartnership or joint-stock company, is made up of the amounts which the partners or associates put in as their stake in the concern. To this they add upon the credit of the company from the means and resources of others to such an extent as their own prudence or the confidence of such other persons will permit. Such additions are held in trust; they do not form capital. If successful in their career the surplus over and above their capital and debts becomes profits, and is either divided among the partners and associates or used still further to extend their operations.[1]

From the nature of the case no definite rules can be established for the guidance of corporate agents in the

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[1] Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280. Where a corporation has on hand actual capital available for the payment of debts exceeding the amount to which it has reduced its stock, the excess may generally be distributed among the stockholders. Strong v. Brooklyn C. T. R. Co., 93 N. Y. 426. See Crandall v. Lincoln, 10 Am. & Eng. Cor. Cas. 149; Siegnoret v. Homer Ins. Co. and note, Id. 131, 134; In re Direct Spanish Tel. Co., 16 Id. 377; Baringtyne v. Same, Id. 358.

exercise of the important function of declaring dividends and by which the wisdom and good faith of its exercise can be determined afterwards. Courts of equity look carefully into all the attendant circumstances, and, unless it is plainly apparent that the directors have abused their discretionary power to such an extent as to injure the ultimate interests of shareholders or imperil the rights of creditors, refuse to interfere.[1]

§ 442. **When a court of equity will order a dividend paid.** —But while the general rule is as just stated, yet when the right to a dividend is clear and there are funds from which it can properly be made, and the directors inequitably, wantonly or oppressively are using their power, a

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[1] Hunter v. Roberts (Mich. 1890), 31 Am. & Eng. Corp. Cases, 349; Howell v. Chicago, etc., R. R. Co., 51 Barb. 378; Ely v. Sprague, Clarke's Ch. (N. Y.) 351; William v. Western Un. Tel. Co., 93 N. Y. 162; Park v. Grant Locomotive Wks., 40 N. J. Eq. 114; Barnard v. Vermont, etc., R. R. Co., 7 Allen, 512; Chaffee v. Rutland R. R. Co., 55 Vt. 110; Smith v. Prattville Mfg. Co., 29 Allen, 503; Barry v. Merchants' Exch. Co., 1 Sandf. Ch. 280; Rex. v. Bank of England, 2 Barn. & Ald. 620; Stringer's Case, L. R. 4 Ch. 475; Browser v. Monmouthshire Ry. & Canal Co., 4 Eng. L. & Eq. 118. Directors may distribute part and withhold a part of profits. State v. Baltimore, etc., R. R. Co., 6 Gill. 363; State v. Bank of La., 6 La. 745. An action at law will not lie to compel directors to declare a dividend. The remedy is in equity. Karnes v. Rochester, etc., R. R. Co., 4 Abb. Pr. N. S. 107; Carpenter v. N. Y., etc., R. R., 5 Abb. Pr. 277. The courts will not interfere except in a very strong case. State v. Bank of La., supra; Lambert v. Neuchatel Asphalt Co., 51 L. J. Ch. 882. See Dent v. London Tramways Co., 50 L. J. Chan. 190; s. c. L. R. 16 Chan. Div. 344; Davidson v. Gilliss, Id. 182. Nor can the free exercise of this discretion of the directors be forestalled or interfered with by or on account of the contracts of promoters or original incorporators with respect to the disposition of profits. Coyote, etc., Co. v. Ruble, 8 Or. 284. See Richardson v. R. R. Co., 44 Vt. 613. In Hunter v. Roberts (Mich.), 31 Am. & Eng. Corp. Cas. 349, 356, the court said: "Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can without detriment to its business divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud or breach of that good faith which they are bound to exercise toward the stockholders."

court of equity will interfere to compel the company to declare a dividend.[1]

It is not indispensable that a company be free from the pressure of floating debt before a court of equity will compel it to pay a dividend even to holders of non-preferred stock.[2] A somewhat different rule applies with respect to the right of preferred stockholders to have a dividend declared, and a court of equity will sometimes entertain a bill by them under circumstances which would not warrant interference on behalf of a holder of common stock. The question is one upon which the decision of the directors is not conclusive, but will be reviewed by the court.[3]

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[1] Belfast & M. L. R. Co. v. Belfast, 77 Me. 445; State v. Bank of La., 6 La. 745; Williston v. Mich. So. & No. Ind. R. Co., 13 Allen, 400; Scott v. Eagle F. Ins. Co., 7 Paige, 203; Boardman v. Lake Shore & M. S. R. Co., 84 N. Y. 157; Stevens v. S. Div. Ry. Co., 9 Hare, 313; Jermain v. Lake Shore & M. S. R. Co., 91 N. Y. 483; Pratt v. Pratt, 33 Conn. 448; Beers v. Bridgeport Spring Co., 42 Conn. 17; Brown v. Buf., etc., R. R. Co., 27 Hun, 342. Courts of equity will never hesitate, in a plain case of neglect and refusal on the part of directors, the finances of the corporation justifying it, to compel directors to pay a dividend to preferred shareholders who are equitably entitled to it. Hazeltine v. Belfast & M. L. R. Co., 79 Me. 411; 10 A. 328. And directors will be compelled to declare a dividend and sale of all the corporate property. Cramer v. Bird, L. R. 6 Eq. 143.

[2] Hazeltine v. Belfast & M. L. R. Co., 79 Me. 411. An action at law will not lie against a corporation by a stockholder for its refusal to declare a dividend. Karnes v. Rochester & G. V. R. Co., 4 App. Pr. (N. Y.) N. S. 107.

[3] Hazeltine v. Belfast, etc., R. Co., 79 Me. 411; Henry v. Gt. N., etc., Ry. Co., 4 R. & J. 1; Boardman v. Lake Shore, etc., R. Co., 84 N. Y. 157, 180; Belfast, etc., R. Co. v. Belfast, 77 Me. 445. In the last case the court say: "It does not necessarily follow that debts should be wholly paid before a dividend is disclosed merely because they are of a floating character. When the right to a dividend is clear and there are funds from which it can properly be made, a court of equity will interfere to compel the company to declare it." See also, Sturge v. Eastern, etc., R. Co., 7 De G. M. & G. 158; Smith v. Cork, etc., R. Co., L. R. 3 Eq. 356; Bailey v. Hannibal, etc., R. Co., 1 Dill. 174; Prouty v. Mich., etc., R. Co., 1 Hun, 655; Thompson v. Erie, etc., R. Co., 45 N. Y. 468; Barnard v. Vermont, etc., Co., 89 Mass. 572; Williston v. Mich., etc., R. Co., 95 Mass. 400, holding that when a preferred stockholder is entitled to share *pro rata* with holders in common stock in dividends over and above the preference, his remedy is by suit in equity, and not by action at law against the corporation. It was held, however, in Westchester, etc., Co. v. Jackson, 77 Pa. St. 321; that assumpsit was the proper remedy for dividends on preferred stock. The claim

§ 443. **Capital stock cannot be impaired.**—The managing officers will not be allowed by misconduct to reduce the capital stock of a corporation below the amount limited by the charter, though such reduction often results from misfortune or the accidents of business over which they have no control and for which they are not responsible.

Corporate property in excess of its capital stock is often in a general sense regarded as a part of the capital; but in a strict legal sense it is surplus property. The managing agents have the bare right to divide the property in kind among the shareholders, though in most cases such division being impracticable the property is converted into cash, and that is turned over to shareholders as dividends.[1]

§ 444. **The nature of the investment important.**—In some corporate enterprises it is the design and purpose that the original capital acquired from the shareholders shall be invested in property of uncertain and wasting character. Thus in a lease or purchase of mining property the termination and exhaustion is only a matter of time. In such cases it is plain that unless an accumulation of profits or a sinking fund is provided to take the place of a constantly depreciating value of the investment, the business of the corporation and its assets, other than its machinery and other loose property, will come to an end and disappear simultaneously.

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of the preferred shareholder was considered in the nature of a mortgage and the proceeding not an attempt to enforce the declaration of a dividend. In Thompson v. Erie, etc., R. Co., 45 N. Y. 468, it was held that in an action brought by a preferred shareholder against the corporation the holders of common stock are not necessary parties. Compare Rutland R. Co. v. Thrall, 35 Va. 536; Richardson v. Vt., etc., Co., 44 Vt. 613; Barnard v. Vt., etc., R. Co., 89 Mass. 512; Bates v. Androscoggin, etc., R. Co., 49 Me. 491.

[1] Scott v. Cent. R. R., etc., Co. of Ga., 52 Barb. 45; Williams v. Western Union Tel. Co., 93 N. Y. 162.

Of course if the company does business on a cash basis it may disburse all the current profits of the business in the form of dividends to the stockholders without loss or injury to any one; and it seems, without some provision in the charter or by-laws looking to their security, creditors will have no right to interfere with the control and disposition of the earnings in any event. Outside parties must take notice of the nature and probable result of the corporate venture, and contract with the corporation with these in view. In such cases dividends may be paid out of current annual profits, out of profits arising from the excess of ordinary receipts over expenses properly chargeable to the revenue account, provided it is done honestly. The capital and revenue accounts are to be regarded as distinct and separate accounts; and for the purpose of determining profits, accretions to and diminutions of the capital will be disregarded.[1]

§ 445. **Discretionary power of directors to provide for future maturing liabilities.**—But the mere existence of a surplus does not always justify the declaration of a dividend. There may be obligations to mature at a future time secured by mortgage on the property of the corporation, in which case, and in all similar cases, it will be but the exercise of ordinary prudence by the directors to refuse to treat a surplus not immediately needed as net earnings, and to preserve the accumulations to meet the outstanding indebtedness at its maturity.[2]

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[1] Lee v. Neuchatel Asphalt Co., L. R. 41 Ch. Div. 1. See also, Williams v. Western Un. Tel. Co., 93 N. Y. 162; Strong v. Brooklyn Cross-Town R. R. Co., Id. 427; Park v. Grant Locomotive Works, 40 N. J. Eq. 114. Compare In re Oxford Benefit B. & I. Soc., L. R. 35 Ch. D. 502.

[2] In the case of Karnes v. Rochester, etc., R. R. Co., 4 Abb. Pr. N. S. 107, a stockholder sought to compel the defendant corporation to declare and pay a

§ 446. **When dividend becomes property of shareholder.**—A distinction exists between the shareholder's right to have a dividend declared and his right to a dividend already declared. In the latter case the directors cannot refuse to pay it because they have determined to establish a surplus fund with a view to benefit the corporation and its stockholders. The dividend has already become a debt, and cannot be disposed of without the consent of the person entitled to it,[1] and is subject to garnishment or attachment or execution like other debts.[2]

§ 447. **Delay in making demand.**—Dividends declared on stock in a corporation are payable on demand like irregular deposits in a bank. Until demand and refusal prescription and limitation do not begin to run against the person entitled.

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dividend on the ground that it then had a large surplus on hand not needed for expenses.

It appeared that the ground upon which they had refused was the fact that the company was largely indebted, though its liability did not mature until some time in the future. The court clearly defined the duties and powers of the directors in the premises as follows: "The funds on hand which the plaintiff asks to have divided and distributed among the several stockholders are only about half sufficient to pay the indebtedness of the defendant. It is of no sort of consequence in a legal point of view that the debt is not yet due and has a number of years to run before it matures. The creditors still have the better right to the funds which the defendant holds for them in trust. The court cannot undertake to say judicially that the future business of the corporation will be prosperous; nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain that they would accrue. The board of directors, in their discretion, and in view of all the facts within their knowledge, might do this; but no court, I apprehend, would even undertake to deal in such a manner with the funds of a corporation which was indebted to an amount at least double the fund sought to be distributed."

[1] Seeley v. N. Y. Nat. Exch. Bank, 8 Daly, 400; aff'd 78 N. Y. 608; Beers v. Bridgeport Spring Co., 2 Weekly Dig. 8; 42 Conn. 17; King v. Patterson, etc., R. Co., 29 N. Y. (5 Dutch.) 82; Wheeler v. N. W. Sleigh Co., 39 F. 347; Hopper v. Sage, 112 N. Y. 530.

[2] Hughes v. Or. Ry. Co., 11 Or. 158; 2 P. 94; Norton v. Norton, 43 O. St. 509; 3 N. E. 348.

Where the stock of an expiring corporation is merged in the stock of a new one, organized as its successor, acquiring its franchises and assuming its obligations, a provision inserted in the charter of the new company, forfeiting dividends not claimed within a certain period from the time when declared, is not binding upon the old stockholders except from the time when expressly, or by implication, they consent thereto, by assuming the quality of stockholders in the new company.[1]

§ **448. Converting surplus into working capital.**—Accumulated funds of a corporation are sometimes blended with other personal property in such a manner that, for all practical purposes, they are a part of its working capital. For instance, a trading corporation having, in addition to its original chartered capital, accumulated earnings which it invests in the kind of securities, materials or merchandise in which it is its business to deal. This the directors clearly have a right to do. It is an enlargement and extension of the corporate enterprise within the scope of its chartered authority.

A bank of deposit, exchange and loan often reserves a portion of the net earnings as a reserve fund to protect itself from unseen contingencies and liabilities, to fortify its credit and facilitate its operations. The same may be said of many other private moneyed corporations requiring at times the command of large resources in ready cash.

A railroad corporation, engaged extensively in operating its lines already constructed, often finds it advanta-

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[1] Armont v. New Orleans, etc., R. Co., 41 La. Ann. 1020; 31 Am. & Eng. Cor. Cas. 174, n. In this case it was held that an old stockholder who had been ignorant of his rights and of the transfer, and who claimed his dividends as soon as informed of their existence, could not be affected by such a provision except *in futuro*.

geous to build branch lines, construct warehouses, and transfer boats, and make numerous investments auxiliary and adjunctive to the main enterprise. Where the directors see fit to accumulate a surplus for purposes of this kind, in order to justify their conduct in so doing, it is only necessary to show that they are acting in good faith, and that the probabilities are in favor of the profitableness of the proposed investment of the surplus. Such showing is a good defence to any action to compel them to declare a dividend.[1]

A stockholder has no legal claim to any portion of the net earnings until a dividend has been declared. If, before that event, he assigns his shares, the transfer carries with it the right to all undeclared dividends, no matter when earned. The profits before separation from the general fund by act of the board of directors constitute a part of the assets of the corporation.[2]

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[1] The provision of the "plan and agreement" for reorganization of a railway company that preferred stock should entitle "the holders to non-cumulative dividends at the rate of 6 per cent. per annum in preference to the payment of any dividend on the common stock, but dependent upon the profits of any particular year as declared by the board of directors," was held not to operate to deprive the directors of the usual discretion of managing agents of corporations in distributing earnings. The words "as declared by the board of directors" were held to refer to dividends, not to profits; and the directors could devote the profits of any given year to improvements instead of dividends. N. Y., Lake Erie & W. R. Co. v. Nickals, 119 U. S. 296. See also Warren v. King, 108 U S. 389; U. P. R. Co. v. U. S. 99; U. S. 402; Barnard v. Vermont & Mass. R. Co., 7 Allen, 512; Williston v. Mich. Sou. R. Co., 13 Allen, 400; Chaffee v. Rutland Railroad, 55 Vt. 110; Taft v. Hartford, P. & F. R. Co., 8 R. I. 310; Elkins v. Camden, & Atl. Co., 36 N. J. Eq. 233; Lockhart v. Van Alstyne, 31 Mich. 76; Culver v. Reno R. E. Co., 91 Pa. St. 367. It has been held that directors may apply accumulated profits to the payment of unpaid balances due on subscriptions instead of distributing it to stockholders in the form of dividends. Kenton, etc., Co. v. McAlpin, 5 Fed. R. 737.

[2] Burroughs v. North Carolina R. R. Co., 67 N. C. 370; Boardman v. Lake Shore, etc., R. R. Co., 84 N. Y. 157; Granger v. Bassett, 98 Mass. 462; Lockhart v. Van Alstyne, 31 Mich. 76; Curry v. Woodward, 44 Ala. 305; Phelps v. Farmers', etc., Bank, 26 Conn. 269; Goodwin v. Hardy, 57 Me. 143; Brundage v. Brundage, 65, Barb. 397; where the owner of bank stock directed another to obtain all the money possible thereon and pay the owner's debt to a bank and addde: "You may apply any and all balance towards the part of any indebted-

§ 449. Profits must be distributed impartially.—There must be no discrimination among stockholders of the same class in the payment of dividends.[1]

All stockholders during any given period are equally interested in the property and business of a corporation. Hence, in declaring a dividend on the results of corporate operations at the end of such period or afterwards, the directors have no right to discriminate among them unless the charter gives them that power. And in such case a court of equity will interfere at the suit of a wronged shareholder and compel the directors to do equal justice to all, without discrimination.[2]

All the shareholders, at the time when a dividend is

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ness to you," it was held the holder of the order could not maintain an action against the company for dividends due on the stock. Ware v. Merchants' Nat. Bank, 151 Mass. 445. A due-bill payable "from the first dividends declared by" a certain company, is payable out of the maker's share of the assets of the company on its going into liquidation, and dividing the assets among the shareholders, without having declared a dividend on profits. Cozad v. McKee, 130 Pa. St. 406; 18 A. 618. A building and loan association which has loaned money to one of its stockholders on a bond and mortgage conditioned for the payment of a specified rate of interest, together with a monthly installment on each share of the stock owned by him, until the principal sum is paid, can recover, on foreclosure, the amount in arrear, without any deduction for the monthly installments paid by the stockholder, as he will receive the benefit of such installments in the increased value of his shares. People's Building & Loan Ass'n v. Furey (N. J.), 20 A. 890. "As a general rule, nothing earned by a corporation can be regarded as profits until it shall have been declared to be so by the corporation itself acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as a profit. The wisdom of such distribution must of necessity rest with the corporation itself. From motives of prudence and self-interest, it is frequently desirable to add all or a portion of the earnings to the capital. This is sometimes necessary as a basis of credit for more enlarged operations. It is often a wise exercise of discretion for a corporation to strengthen itself in this way, and with such discretion a stockholder cannot interfere. His only remedy is by an appeal to the ballot at the election for directors." Moss' Appeal, 83 Penn. St. 264, per PAXTON, J.

[1] Harrison v. Mexican R. R. Co., L. R. 19 Eq. 358.

[2] Jones v. Terra Haute, etc., R. R. Co., 57 N. Y. 196; Luling v. Atl. Mut. Ins. Co., 46 Barb. 510; 29 Barb. 353; 17 How. Pr. 529; Phelps v. Farmers', etc., Bank, 26 Conn. 269; Atlantic & Ohio Tel. Co. v. Com., 3 Brewst. 366; Ryder v. Alton, etc., R. R. Co., 13 Ill. 516.

declared, have a right to participate, irrespective of the time at which they became shareholders, or during what period the profits out of which the dividend is declared were earned.[1]

A corporation cannot by any act interfere with rights existing under and by virtue of its shares already sold and in the hands of certificate holders.

A charter conferred a banking franchise upon the then subscribers to the capital stock, and upon "all those who shall afterwards subscribe" so far as to make up the full capital. The board of directors, on a certain day before the entire amount authorized had been taken, adopted a resolution to fill up the authorized capital, and giving liberty to all stockholders who had paid up their subscriptions in full to subscribe for the new stock within a limited time, in amounts proportioned to the number of shares held by them respectively, and notice was sent to those not in arrears. Afterwards plaintiff, who was in arrears on his subscription at the date of the resolution, went to the bank, paid up his arrears, and demanded permission to subscribe for his proportion of the new stock, which was then at a premium. Permission was refused, and he sued the corporation for damages.

The court, in passing upon the duties and rights of the parties under this state of facts, said: "Since the acts of incorporation do not declare how the untaken stock shall be disposed of, it stood like all the other corporate franchises and belonged to the corporators, and they had a right to all the profits that could be derived from it—the bank held the right in trust for its members. The directors might order it to be sold, and then the profits would be shared among the members

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[1] Goodwin v. Hardy, 57 Me. 143; March v. Eastern R. R. Co., 43 N. H. 515.

at the next dividend; or they might allow each member to subscribe for his proportion of the new stock as nearly as it could be fixed in integral shares. This right is easily calculated; it could not be given to one without being given to all; and to deprive plaintiff of his share was a legal injury—a violation of his personal right for which he is entitled to compensation."[1]

§ **450. Preference may be given by statute articles or by-laws.**—It may, however, be provided in the charter or articles of an association, or even in a by-law adopted before rights have accrued, that certain shares shall be preferred, giving all subscribers an opportunity to elect in which class of shares he will invest.[2]

§ **451. Where there is a subsequent acquiescence to a preference given to a part.**—Stockholders may, by acquiescence in acts of partiality by directors in the distribution of profits, render such acts binding upon themselves.

"And where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there is not needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel upon them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties if the

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[1] Reese v. Bank of Montgomery Co., 31 Pa. 10, per LOWRIE, J. See also, Jackson v. Newark P. R. Co., 31 N. J. 277; Beers v. Bridgeport Spring Co., 42 Conn. 17; Hale v. Republican River Bridge Co., 8 Kansas 46; Chase v. Vanderbilt, 62 N. Y. 307; Kent v. Quicksilver Mining Co., 78 Id. 159.

[2] Harrison v. Mexican R. R. Co., L. R. 19 Eq. 358. In Covington v. Covington, etc., Bridge Company, 10 Bush. (Ky.), 69 it was held that where it is necessary, in order to carry into effect the object for which a corporation was created, it may be constitutionally authorized by subsequent legislative acts to borrow money by issuing preferred stock and pledging its resources for the payment of the dividends thereon.

act swere held invalid, the stockholders are estopped from questioning it."[1]

But the power to give preference to one shareholder over another, as by issuing preferred stock to a part, cannot be maintained without actual authority of law or the consent of all the holders of common shares.

When preferred stock has been issued in pursuance of authority contained in the constating instruments or otherwise conferred, the holder is usually entitled to priority of dividends and not of assets and capital.

When such power is given, the preferred shareholder ranks before, and sometimes even to the exclusion of, ordinary members.[2]

§ 452. Payment of dividends in scrip.—In England dividends are payable only in cash;[3] but in the United States a charter or articles often provides that the corporation may retain the accumulated profits and issue scrip or stock dividends in lieu thereof to the shareholders.[4]

Power to increase the capital stock is a necessary incident to authority to do this where all the original stock has been taken.

Unless it is otherwise provided in the charter or bylaws, stock dividends become at once a part of the cap-

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[1] Kent v. Quicksilver Mining Co., 78 N. Y. 159, per FOLGER, J.

[2] In re Bangor, etc., Slab Co., L. R. 20 Eq. 59; In re London India Rubber Co., 5 Id. 519.

[3] Haule v. Gt. Western R. R. Co., L. R. 3 Ch. 262.

[4] See Howell v. Chicago, etc., R. R. Co., 51 Barb. 378; Brown v. Lehigh Coal etc., Co., 49 Pa. St. 270; Earp's Appeal, 28 Pa, St. 368; Wiltbank's Appeal, 64 Id. 256; Bailey v. Citizens' Gas. Light Co., 27 N. J. Eq. 196; State v. Balt. etc., R. R. Co., 6 Gill. 363; Citizens', etc., Ins. Co. v. Lott, 45 Ala. 185. A special act authorized a railroad company to distribute among its stockholders the shares of stock purchased by it from the state under another act. It was held that such acts give authority to make the distribution, notwithstanding the provisions of the general law forbidding railroad companies declaring a stock dividend without authority of the general court. Com. v. Boston & A. R. Co., 142 Mass. 146; 7 N. E. 716.

tial stock of the corporation, and may be voted even when they represent net earnings.[1]

This doctrine, however, is not universally recognized, and a different rule has been adopted in New York and a few other states.[2]

When a corporation has power to increase its capital stock, it is immaterial whether it sells the additional shares in the market and pays the proceeds, in the form of dividends, to the original shareholders, or awards the shares to them as dividends in lieu of so much money.[3]

§ 453. Distinction between new allotment and scrip dividend.—There is a clear distinction between an allotment of new stock to shareholders or outside parties where all that was authorized by the charter were not issued before beginning business, or to another corporation in payment for its plant and franchises under statutory power to acquire the same and consolidate,[4] and the payment of dividends on the stock already held in new stock or scrip entitling the holder to the new stock. The latter may be done by unanimous consent of the stockholders, without special statutory authority other than general authority to increase the capital. But inasmuch as it is a material variation of the terms of contracts of subscription made on the basis of the original capital, it is plain that neither the majority nor the directors in the exercise of general discretionary powers

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1 Bailey v. Railroad Co., 22 Wall. 604.

2 Clarkson v. Clarkson, 18 Barb. 646; Simpson v. Moore, 30 Id. 637; Hyatt v. Allen, 56 N. Y. 553. Compare Williams v. Western Un. Tel. Co., 93 N. Y. 169.

3 Howell v. Chicago, etc., R. R. Co., 51 Barb. 378. The following cases decide matters pertinent to this branch of the subject. Leland v. Hayden, 102 Mass. 542; Minot v. Paine, 99 Mass. 101; Ashurst v. Field, 26 N. J. Eq. 1; Richardson v. Richardson, 75 Me. 570; Roberts' Appeal, 92 Pa. St. 407; Riggs v. Cragg, 26 Hun, 89; Peirce v. Burroughs, 58 N. H. 302; New England Trust Co. v. Eaton, 140 Mass. 532.

4 Supra, Ch. VI.

can, without express authority previously conferred, either by statute or in the articles of association, or given in the contracts themselves, retain surplus earnings not needed for any of the legitimate purposes of the company, and compel stockholders to accept an increased interest in the corporation and assume a corresponding increase of liability to creditors. True, directors have a discretion to determine how, when and where a dividend shall be paid. True, also, they may make it payable in property as well as money into which property has been converted. But to deliver a further interest in the corporation when the contract with the shareholder calls for the profits, whether property or money, on his present interest cannot properly be called a payment at all. It is only giving to the stockholder the evidence of what he had before, namely, an increased interest in the aggregate venture, except that a present right of enjoyment is, without his consent, indefinitely postponed. There are, however, respectable authorities which maintain the doctrine that this is among the powers of the majority and a discretionary power of the directory clothed with general powers of management and control.[1]

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1 In Williams v. Western Union Tel. Co., an important authority on the subject, there was statutory authority under which the legality of the proceedings by the directors might very reasonably have been upheld; but the court assumed the general right to make such disposition of the surplus, independent of the statutes referred to. See also Howell v. Chicago & N. W. R. Co., 51 Barb. 378; Jones v. Terre Haute & R. R. Co., 57 N. Y. 196; Kenton Fur, etc., Co. v. McAlpin, 5 Fed. Rep. 743; Atty.-Gen. v. State Bank, 1 D. & B. Eq. Cas. 545; Minot v. Paine, 99 Mass. 101; Rand v. Hubbell, 115 Id. 471; Brown v. Lehigh Coal and Nav. Co., 49 Pa. St. 270; Com. v. Pittsburg, Fort W., etc., R. R. Co., 74 Id. 83; Barton's Trust, L. R. 5 Eq. Cas. 239; Mills v. N. R. of B. A. Co., L. R., 5 Ch. App. 621. Terry v. Eagle Lock Co., 47 Conn. 141, sometimes cited in this connection, was decided upon an entirely different ground than the right of the majority to dispose of the surplus in the way of a stock dividend. In fact, the court clearly recognize the right of the dissenting stockholder to the preventive relief prayed for had he been guilty of no laches resulting in the interests of innocent purchasers of the new shares becoming involved. CARPENTER, Judge, delivering the opinion said: "There is a

§ **454. Usually payable in cash.**—As a general rule, payment must be in lawful currency, and in the absence of a provision to the contrary in the contract or articles the shareholder is not bound to accept payment in anything else.[1]

Where profits had so accumulated as to authorize a dividend of four per cent., and the directors by resolution declared it "payable in New York State currency," it was held that a stockholder was not bound to accept

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difference, however, between a cash and a stock dividend. The former is created by a single vote of the directors, and the amount thereby becomes severed from the general fund and belongs to the stockholders *pro rata.* The latter can be initiated only by a vote of the stockholders. That is followed by issuing the stock, and the increase can only be completed legally by filing with the town clerk and with the secretary of the state the certificates required by law. . . . . Again, a cash dividend entitles the stockholder to so much money, the ordinary way in which he receives from time to time the fruits of his investment. Such dividends do not materially affect the value of the stock. A stock dividend is exceptional. It does not add to his ready cash, but it changes the form of his investment by increasing his number of shares, thereby diminishing the value of each share, leaving the aggregate value of all his stock substantially the same." See also, Scoville v. Thayer, 105 U. S. 143; Weaver v. Borden, 49 N. Y. 286; Barnes v. Brown, 80 Id. 534; Green's Brice's Ultra Vires, 142; Upton v. Tribilcock, 1 Otto, 45. An act authorizing the issue and delivery of shares of stock in payment for property will not authorize its issue and delivery for another purpose, viz., for distribution as a stock dividend among the stockholders of the purchasing company. Scoville v. Thayer, supra; N. Y. etc., R. Co. v. Schuyler, 34 N. Y. 30, 49. If a corporation, instead of dividing profits actually earned, issues scrip certificates of indebtedness therefor convertible into stock when authority to increase the capital stock shall be obtained, the life tenants of the stock and not the remainderman acquire title to the scrip certificates. App. of Phila. T. S., D. & I. Co. (Pa.), 26 Am. & Eng. Cor. Cas. 433; 16 A. 734. As to life tenant to extraordinary dividends, see Gilkey v. Paine, 80 Me. 319; 31 Am. & Eng. Corp. Cas. 21 Id. 349, 351; Bauch v. Sproule, Id. 426, 448, n.

The articles of association of a water works company empowered the directors with the sanction of the company to declare a dividend "to be paid" to the shareholders. After having invested its profits in an extension of its plant, the directors passed a resolution proposing to give the shareholders debenture bonds bearing interest and redeemable at par by an annual drawing extending over thirty years. It was held that the proposition contained in the resolution was *ultra vires*, and the directors were restrained from acting on it. Wood v. Odessa W. Co., L. R. 42 Ch. Div. 633.

[1] Scott v. Central R. R. Co., 52 Barb. 45.

them in payment, but might insist upon being paid in money.[1]

§ 455. **Guaranteed dividends.**—Shareholders whose certificates provide that they shall receive periodical dividends, equal to a certain per cent. of the par value of the stock, are entitled to receive such dividends from the net earnings, before anything is paid to ordinary shareholders; and in the event that such earnings do not satisfy their demand, the balance must afterwards be paid from the net earnings, when earned and received by the company.[2]

Such shares are said to be preferred or guaranteed. No difference in legal effect can be attributed to these words, nor have they by custom acquired distinct meanings.[3]

The guarantee of a dividend does not imply that the holder shall receive dividends equal to the specified per cent. at all events. Nor can a corporation bind creditors and other shareholders to such agreement without their clear and unequivocal consent.

§ 456. **Conditioned upon the earning of profits.**—The guarantee is upon the implied condition that profits are earned.[4]

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[1] Ehle v. Chittenango Bank, 24 N. Y. 548. See also, Keppel v. Petersburg R. R. Co., Chase's Decis. 167.

[2] Boardman v. Lake Shore, etc., R. R. Co., 84 N. Y. 157; Lockhart v. Van Alstyne, 31 Mich. 76; Gordon v. Richmond, etc., R. R. Co., 78 Va. 501; Totten v. Tison, 54 Ga. 139; Painsville, etc., R. R. Co. v. Leverett, 17 Ohio St. 534; Prouty v. Mich. Southern & Northern Ind. R. R. Co., 4 Thompson & Cook (N. Y.) 230; s. c. 1 Hun, 655; Elkins v. Camden, etc., R. R. Co., 36 N. J. Eq. 233; Union Pacific R. R. Co. v. United States, 99 U. S. 402; Chaffee v. Rutland, etc., R. R. Co., 55 Vt. 110; Thompson v. Erie R. R. Co., 45 N. Y. 465; Belfast, etc., R. R. Co. v. Belfast, 77 Me. 445; Cunningham v. Vt., etc., R. R. Co., 12 Gray, 411; Manning v. Quicksilver Mining Co., 24 Hun, 360.

[3] Henry v. Gt. Northern R. R. Co., 4 K. & J. 1.

[4] Warren v. King, 108 U. S. 389; Burt v. Rattle, 31 Ohio St. 116.

The guarantee of a dividend by a corporation is considered by the courts and by the business community also to mean nothing more than a pledge of the funds, legally applicable to the purposes of a dividend. In short, it is a dividend and not a debt which is preferred and guaranteed.[1]

But the claim of the preferred shareholder, to the guaranteed dividend, will prevail over that of ordinary shareholders as a continuing liability entitled to prior liquidation out of subsequent profits, although the dates at which they are payable are specified in the certificate.[2]

§ 457. Right to dividends as between life tenant and remainderman.—The life tenant and not the remainderman is entitled to a cash dividend of profits which have been earned since the last preceding dividend, if the last preceding dividend was made in a regular and reasonable time.[3]

The rule applies, though the dividend in question was earned wholly or in part prior to the commencement of the life estate.[4]

But where the dividend is declared before but is

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[1] Taft v. Railroad Co., 8 R. I. 335. In Bailey v. Hannibal, etc., R. R. Co., 1 Dillon, 174, preferred stock certificates issued by a railroad company were construed and held to give the holders thereof a preferable right to the first seven per cent. of the net earnings each year, after which the holders of common stock were entitled to the next seven per cent.; and if any surplus remained it should go to the holders of preferred and common stock equally.

[2] Boardman et al. v. Lake Shore, etc., R. R. Co., 84 N. Y. 157; Corey v. L. & E. R. R. Co., 29 Beav. 263; Harrison v. Mexican R. R. Co., 19 Eq. Cas. 358; Lindley on Part. (4 Ed.), 796, 798; Stevens v. S. Devon R. R. Co., 9 Hare, 313; 12 Eng. Law & Eq. 229; Matthews v. G. N. R. R. Co., 5 Jurist (N. S.), Part 1, 284.

[3] Barclay v. Wainwright, 14 Vesey, 66; Norris v. Harrison, 2 Madd. 268; Clive v. Clive, Kay, 600; Murray v. Glaise, 17 Jur. 816; Preston v. Melville, 16 Sim. 163; Cumming v. Boswell, 2 Jur. (N. S.) 1005. See Ware v. McCandish, 11 Leigh, 595; Price v. Anderson, 15 Sim. 473.

[4] Richardson v. Richardson, 75 Me. 570; Bates v. McKinley, 31 Beav. 280; Jours v. Ogle, L. R. 8 Ch. 192; Goldsmith v. Swift, 25 Hun, 201; Jermain v. Lake Shore, etc., R. R. Co., 91 N. Y. 483.

made payable after the testator's death, it belongs to the estate.[1]

A more complicated question arises when the dividend in dispute between the life tenant and remainderman is not a cash dividend but a dividend in kind, that is, in stock or property. If the dividend is held to be income, then it belongs to the life tenant; but if it is held to form a part of the principal or *corpus* of the estate, then it goes to the remainderman or inures to the benefit of his estate.[2]

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[1] De Gendre v. Kent, L. R. 4 Eq. 283. See also Browne v. Collins, L. R. 12 Eq. 586, 594; Locke v. Venables, 27 Beav. 598; Cogswell v. Cogswell, 2 Edw. Ch. 231; Abercrombie v. Riddle, 3 Md. Ch. 320; Wright v. Tuckett, 1 Johns. & Hern. 266; Farley v. Hydes, 42 L. J. Ch. 626.

[2] Upon this subject a rule was early declared in Pennsylvania which seems reasonable and just. Inasmuch as it has become the established rule in all the states, with two exceptions to be presently noticed, it is sometimes called the "American" rule. It discards all technical rules, and allows the facts whether the fund out of which the extraordinary dividend is to be paid was earned or accumulated before the life estate arose or afterwards to govern in deciding to whom they shall belong. If found to have accrued before the life estate arose the fund is held to be principal, without reference to the time when payable. If, on the contrary, it was earned or accrued during the life estate, it is income and belongs to the life tenant. Earps' Appeal, 28 Pa. St. 368; Moss' Appeal, 83 Pa. St. 264; Vinton's Appeal, 99 Id. 434. Under the operation of this rule a scrip dividend convertible into stock belongs to the life tenant where it would belong to him if payable in cash. Philadelphia, etc., Company's Appeal (Pa.), 16 Atl. Rep. 734. See also, Van Doren v. Olden, 19 N. J. Eq. 176; Ashhurst v. Fields' Admr., 26 Id. 1; Lord v. Brooks, 52 N. H. 72; Wheeler v. Perry, 18 N. H. 307; Pierce v. Burroughs, 68 N. H. 302; Riggs v. Craggs, 89 N. Y. 479; In re Kernochan, 104 N. Y. 618; Clarkson v. Clarkson, 18 Barb. 646; Simpson v. Moore, 30 Barb. 637; Goldsmith v. Swift, 25 Hun, 201; Hites' Exrs. v. Hites' Devisees (Ky.), 2 Ry. & Corp. L. J. 568.

The rule which was established in Massachusetts in Minot v. Paine, 99 Mass. 101, and has since been adhered to in that state, adopted in Georgia under the construction given to the statute in the latter state, regards cash dividends, whether large or small, as income, and gives them to the life tenant, and stock dividends as capital or principal and gives them to the remainderman. For subsequent applications of the rule in Massachusetts see Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542; Hemenway v. Hemenway, 134 Id. 446; N. E. Trust Company v. Eaton, 140 Id. 532; Davis v. Jackson (Mass.), 31 Am. & Eng. Cor. Cas. 387, n.; 25 N. E. 21.

For Georgia rule see Millan v. Gumard, 67 Ga. 284; Code of Ga., sec. 2256. This rule seems to be favored in the District of Columbia. Gibbons v. Mahan, 4 Mackey, 130. In Rhode Island a modification of the Massachusetts or "Minot"

§ 458. **How far intention of testator controls.**—While the intention of the testator, so far as manifested, should of course control in such cases, yet, in the absence of a clear expression of his intention and direction as to what shall be considered principal and what income, the lawful power of the corporation and its action must be examined, and will, when ascertained, be given effect in the appropriation and use of its earnings, having regard to its dealing with all its shareholders.[1]

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rule has been adopted, which is more favorable to the remainderman than to the life tenant. See Parker v. Mason, 8 R. I. 427; Busbee v. Freeman, 11 R. I. 149; Petition of Brown, 14 R. I. 371. In Green v. Smith (R. I. 1890), the supreme court of Rhode Island adheres to its former ruling. In Daland v. Williams, 101 Mass. 571, where the capital stock having been increased by three thousand shares, a cash dividend of forty per cent. was declared, and the treasurer was authorized to receive that dividend in payment for two thousand eight hundred of the shares, remaining two hundred shares to be sold. The court held that the transaction was virtually a stock dividend, and that the shares must go to the estate of the remainderman. Thus it is seen that the courts will consider the actual and substantial character of the transaction, and not merely its nominal character, in the application of the "Minot" rule. See also, Rand v. Hubbell, 115 Mass. 461; Leland v. Hayden, 102 Mass. 542.

1 In Gibbons v. Moran, 136 U. S. 549; 31 Am. & Eng. Cor. Cas. 374, 378, Justice GRAY, delivering the opinion, said: "When a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital or a division of profits and income depends upon the substance and intent of the action of the corporation as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital and a dividend in money is to be deemed income of each share. A stock dividend really takes nothing from the property of the corporation and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased." Citing Bailey v. N. Y. Cent. & H. R. R. Co., 22 Wall. 604.

In Earps' Appeal, 28 Pa. St. 368, it appeared that a portion of the residuary estate bequeathed by a testator to his executors "in trust to collect the rents income and interest, and to pay one equal fourth part" to and for the use of each of his four children, was stock held by the testator in a manufacturing company, upon which large surplus profits over and above the current dividends declared had accumulated, and continued to accumulate for several years after his death, when, with the consent of the executors and legatees, the capital stock of the company was increased and the new stock distributed among the stockholders in proportion to the stock held by them respectively, and the old certificates issued to the testator were surrendered and cancelled, and new certificates for the whole amount of stock, including the increase, were issued to the executors, the surplus earnings or profits being applied to the payment of such increased shares of stock, it was held,—

§ **459. The New Jersey rule.**—The following rule was laid down by the Court of Chancery of New Jersey :— Where trust funds, of which the income, interest, or profits are given to one person for life, and the principal bequeathed over upon the death of the life tenant, are invested in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital. This, as well as the par value of the shares, must be kept by the trustees intact for the benefit of the remainderman. But the earnings on such capital, as well as upon the par value of the shares, belongs to the life tenant. When an extra dividend is declared out of the earnings or profits of the company, it belongs to the life tenant, unless part of it was earnings carried to account of accumulated profits or surplus earnings at the death of the testator, or at the time of the investment, if made since his death, in which case so much must be considered as part of the capital.[1]

If the owner of bank shares conveys them to another in trust, the dividends to be paid to the owner as they are declared, and after his death to transfer said shares to the heirs of a third party, the net earnings will remain the property of the bank until a dividend is declared as fully as its other property ; and the tenant for life is not previously entitled to such earnings.[2]

1. That the surplus fund accumulated by the company, over and above the current dividends at the time of the death of the testator, was a part of the principal of the fund and was subject to the trusts contained in the will.

2. That the surplus fund accumulated at the time of the death of the testator was so essentially a part of the stock itself, that it would have passed by a sale of the stock alone.

3. That there was no bequest to the legatees of the stock itself, but only of the income of it, and their interest in that is limited to the rents or dividends accruing after the death of the testator.

[1] Van Doren v. Olden, 19 N. J. Eq. 176.

[2] Clarkson v. Clarkson, 18 Barb. 646; Lord v. Brooks, 52 N. H. 72; Simpson v. Moore, 30 N. H. 637.

CHAPTER XIX.

TRANSFER OF MEMBERSHIPS.

§ **460. At common law.**—At common law no membership in a corporation of any kind could be transferred by act of the parties. One reason for this was that the enjoyment of a corporate franchise was considered a personal privilege ; another was that the title to shares of stock or to membership was a chose in action and not assignable.[1]

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[1] In an early case where the question arose on an assignment of shares of bank stock by the husband which had been bequeathed to the wife the court said: "Although bank shares may be said to indicate or represent the proportion of interest which the shareholder has in the property of every kind belonging to the company, yet it cannot be said with any propriety that the holder is in the actual possession of the common property of the bank any more than the owner of a bond or note is in the possession of the money of which it is the representative. The only possession which the holder has is the certificate, which is merely the evidence of his interest, as title deeds are of title to land but not of the possession. The stock cannot be considered in the light of a thing in possession and personal estate as distinguished from a *chose in action.* It would also appear from this that at common law it could not be taken in execution and sold for debts." Slaymaker v. Gettysburg Bank, 10 Barb. 373.

But it was held in this country at an early period that such a transfer might be made by assignment and delivery as to enable the transferee to sue in the name of the assignor and recover judgment for his own benefit.[1]

It is now held that the right to transfer shares is implied in the right given by statute to organize corporations and joint-stock companies, and divide their capital stock into shares without any express provisions giving it.[2]

§ **461. Statutory provisions.**—The important place which shares of corporation stock acquired in commercial transactions at an early date in the United States gave rise to statutory provisions facilitating and legalizing their transfer, after the manner of negotiable instruments, except that certain formalities are prescribed for the safety and protection of the corporation issuing shares.

There is a general uniformity in the legislation on this subject, but slight differences are sometimes found to exist. In nearly every state the corporation is made the intermediary, and in effecting the transfer and novation acts, ministerially, with few or no discretionary powers, and can only compel the parties to conform to such rules, regulations and by-laws as are not in conflict with the objects of the statute.[3] Within

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[1] Palmer v. Merrill, 6 Cush. 282. In another case, decided about the same time, it was held that the assignee took the assignor's interest subject to all the equities which existed against him. Mechanics' B'k v. N. Y. Ry. Co., 3 Kernan, 627.

[2] Burrall v. Bushwick R. R. Co., 75 N. Y. 219; Cole v. Ryan, 52 Barb. 168; Bank of Attica v. Manufacturers', etc., B'k, 20 N. Y. 501.

[3] A statute prescribing how stock in private corporations may be transferred in no way affects the power of an executor or trustee to sell and convey property. Jones v. A. T. & S. F. R. Co., 150 Mass. 304; 23 N. E. 43. Nor can the right to make transfers be placed *hors de commerce* by injunction. State v. Am. C. O. Trust, 40 La. Am. 8; 3 So. 409.

those jurisdictions, where the corporation is allowed to retain a lien upon stock for unpaid subscriptions and to refuse to enter the transfer, this is only of course subject to that exception.[1]

§ 462. Memberships in benevolent, etc., associations.—The principal change made by statute is in the fact that the consent of the corporation is not necessary to the right to transfer shares; whereas at common law no such transfer could be effected without consent of all parties. Where personal qualifications are required for membership, as in incorporated religious or benevolent associations, no rights, interests and privileges connected therewith are assignable. The inability to transfer such membership is apparent from the very nature of the case but statutes in some of the states expressly forbid it.

The same objection lies against allowing transfers of membership at will in this case as in a copartnership, the rights and duties of members being strictly of a personal nature. Each member contracts with all the others in view of their character and special virtues or ability, and no member is authorized to withdraw in favor of a stranger. Since, however, as in such associations, there is the inherent right to admit new members after incorporation by election or contract, as provided in by-laws, and to expel members on good grounds, there is no doubt but that they have power, by

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[1] Pendergast v. Bank of Stockton, 2 Sawy. 108, and cases cited. The right cannot be exercised where it would contravene constitutional provisions governing the corporation of which the stockholder is a member. Penn. R. Co. v. Com. (Pa.), 7 A. 368. Under Code Va. 1860, tit. 18, c. 57, sec. 24, providing "that no stock of stock companies shall be assigned on the books, without the consent of the company, until all the money which has become payable thereon has been paid, and that on any assignment the assignee and assignor shall each be liable for any installment which may have accrued, or which may thereafter accrue," an assignor of such stock, though he became possessed of and immediately assigned it as a broker, continues to be liable for assessments. McKim v. Glenn, 66 Md. 479; 8 A. 130.

unanimous consent or otherwise, under proper by-laws, to effect a substitution and novation of membership.

§ **463. Stock book not conclusive.**—The stock book is *prima facie* and not conclusive evidence of who are shareholders in a corporation.[1] Since it is designed to prevent fraud upon creditors and members of the corporation by agents and others, the same policy forbids it being used or resorted to for that fraudulent purpose.

Thus, if one should have stock issued to himself in a fictitious manner or in the name of another without his authority,[2] or in the name of an insolvent or in the name of an infant,[3] the real owner would, in all such cases, be liable to creditors as a stockholder on the shares so taken, or if taken in his own name in the first instance and subsequently transferred to such irresponsible, non-consenting or incompetent person, he would be liable, notwithstanding such transfer.[4] On the same principle no one can be made a transferee for any purpose without his consent.

The transfer in such cases will be treated as a nullity and the owner held on his original liability.[6]

On the other hand, creditors may hold an actual transferee on his liability for unpaid capital though such transfer does not appear on the transfer book.[7] Yet

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[1] Preston v. Cutter, 64 N. H. 461; 13 A. 874. See Witter v. Sowles, 32 F. 762; Thurber v. Crump, 86 Ky. 408; 6 S. W. 145; Kraft v. Cuykendall, 54 Hun, 633; 7 N. Y. S. 140.

[2] Cox's Case, 4 De G. J. & S. 53. Compare King's Case, L. R. 6 Ch. 196.

[3] Castleman v. Holmes, 4 J. J. Marsh, 1; Roman v. Fry, 5 J. J. Marsh, 634; Weston's Case, L. R. 5 Ch. 614; Richardson's Case, L. R. 19 Eq. 588.

[4] Cartmell's Case, L. R. 9 Ch. 691; Heritage Case, L. R. 9 Eq. 5; Hennessy's Ex'rs Case, 3 De G. & S. 191; 2 Mc N. & G. 201; where the transfer had not been accepted by the transferee.

[5] Tripp v. Appleman, 35 F. 19.

[6] Capper's Case and Manus' Case, L. R. 3 Ch. 458.

[7] Thurber v. Crump, 86 Ky. 408. Compare Topeka Mfg. Co. v. Hale, 39 Kan. 23; 17 P. 601; Tripp v. Appleman, 35 F. 19.

until a creditor elects to proceed against the assignee, the assignor whose name still appears on the books as owner of the stock may be held.[1]

§ **464. Statutory definitions.**—Some doubt arises upon reading the definition of the term stockholder as given in the statutes of some of the states. Statutes fixing the liability of stockholders sometimes extend the term to include not only such persons as appear from the books of the corporation to be such, but also to " every equitable owner of stock, although the same appear in the name of another, and also to every person who has advanced the installments or purchase money of stock in the name of a minor so long as the latter remains a minor."[2] There is no doubt but that under such statutes a transfer is complete and binding as between the parties without any entry thereof.[3]

But one may be a general trustee ; that is, he may have general control of a trust fund in the form of stock as guardian, executor or administrator. In that case, he cannot incur liability against the fund in favor of creditors of a corporation or the corporation itself, with respect to that fund.

Again, he may occupy the relation of trustee with respect to a single transaction or series of transactions, as under a power of attorney or agency, or may hold a fund for a specific purpose under special agreement to secure the payment of money for which the property is pledged. Here he is a " trustee of an express trust," and if the subject of the trust is shares of stock, he may or may not be liable as a stockholder according to circumstances. If he procures a transfer to be made on

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1 Brown v. Finn, 34 F. 124. Infra, Ch. XXVIII.

2 Cal. Civ. Code, sec. 322.

3 Sayles v. Bates, 15 R. I. 342; Haegele v. West Stone Mfg. Co., 29 Mo. App. 486; Nicollet Bank v. City B'k, 38 Minn. 85; 35 N. W. 577.

the books to himself and there is nothing entered to show the relation which he sustains to the stock, it is presumed that the corporation and its creditors could elect either to hold him liable or the party he represents when discovered. If the assignment were not entered at all, no question could arise, for then as to creditors, and the corporation, the pledgor, assignee or *cestui que trust* would be not only the equitable but the legal owner. Where there is a straight out *bona fide* transfer of shares without any resulting or unadjusted equities between the parties, or conditions to be performed by which the title is to divest out of the original owner, no trouble would be encountered in deciding which of the parties is liable as stockholder. The whole question would be settled by inspection of the transfer book, which would determine when the liability of the vendor ended and that of the purchaser commenced.

Whatever formalities the charter or the general law imposes to complete the transfer must be complied with before the liability is shifted from the transferrer to the transferee, in an ordinary sale and assignment.[1]

§ 465. Transfer complete upon assignment and notice to company's agent.—The rights resulting between the parties to the transfer by reason of such liability is a distinct and disconnected matter with which the corporation and its creditors have nothing to do.

But strict compliance at all events is not required if there is a *bona fide* attempt to meet all the formalities and requirements of the charter or law and the purpose is defeated by the act of the company's agent or by

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[1] Jones v. Latham, 70 Ala. 164; Shellington v. Howland, 53 N. Y. 371; Worrall v. Judson, 5 Barb. 210; Dane v. Young, 61 Me. 160; Musgrave & Hart's Case, L. R. 5 Eq. 193; Johnson v. Underhill, 52 N. Y. 203; Marino's Case, L. R. 2 Ch. 596; Humby's Case, 5 Jur. N. S. 215. Compare Upton v. Durnham, 3 Biss. 431, 520; Wehrman v. Rearkirt, 1 Cinn. Sup. Ct. 230

some insurmountable obstacle or unforeseen event.[1] It is clear that no record is necessary to perfect the transfer of stock unless it is required by the charter or by-laws of the corporation.[2]

After such assignment and application to the proper agent of the company, the original holder of the shares ceases to be a member of the corporation, and its holding him out as a stockholder is a misrepresentation in which he cannot be charged as a participant; nor does the doctrine of estoppel apply in such case. For the same reasons, the assignee becomes legally and equitably substituted for him to all the benefits and liabilities with respect to the shares from the date of the assignment.[3]

A corporation is not bound with constructive notice of actions pending between the parties concerning the ownership of shares. And it seems that, though it be a party to such action, it may still recognize the legal owner for the purpose of making a transfer on its books without incurring liability to the other party, if the latter should finally prevail in the litigation.[4]

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1 Wells v. Rodgers, 60 Mich. 525; Telford & F. Tp. Co. v. Gerhab (Pa.), 13 A. 90, holding also that the company is liable to the injured party in damages for such refusal. As to what constitutes proper effort on the part of the stockholders, see Harpold v. Stobart, 46 Ohio St. 397; 21 N. E. 637. In Choteau Spg. Co. v. Harris, 20 Mo. 382, 390, the court said:—"An assignment in writing is sufficient between the parties; and if it be notified to the company and they will not allow it to be made according to their by-law, it is as valid against them as if the required formalities had been observed; the courts acting on the principle as between these parties of considering that done which ought to have been done and settling the rights of parties accordingly." Where a company had adopted no by-law regulating transfers and kept only a single book of stock certificates in which was entered a memorandum of transfer, this was held sufficient to charge subsequent creditors and purchasers with notice. Fisher v. Jones, 82 Ala. 117; 3 So. 13.

2 Sales v. Bates, 15 R. I. 342; 5 A. 497.

3 Infra, § 796.

4 In an action to recover certain shares of stock in a corporation, in which the corporation was made a defendant, judgment was rendered for plaintiff against the other defendants for the stock or its value, and restraining the cor-

§ **466. Transfer to insolvent invalid.**—The requirements of good faith and fair dealing also operate to render nugatory a transfer by a shareholder to an insolvent to escape liability to creditors.[1]

Such transfer is fraudulent as against either a creditor whose claim would be defeated if it should be allowed to stand, as well as against the other shareholders upon whom the loss must otherwise fall. So where shares are taken by the management in a fictitious name or in the name of an insolvent and irresponsible party for the purpose of swelling the apparent number of shareholders, the real owner or subscriber would be held liable personally under the name he has assumed.[2]

§ **467. Right of a transferee to sue and share in results of suit.**—A corporation is a continuing institution, irre-

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poration from disposing of or transferring the stock. No interim injunction, however, had issued, and it appeared that, before the judgment, the stock had been transferred from the other defendants on the books of the corporation. It was held that an assignee of the judgment could not, in an action thereon against the corporation, recover from it the stock or its value. Hawes v. Gas Consumers' Ben. Co., 12 N. Y. S. 924.

[1] Mason v. Alexander, 44 O. St. 318; 7 N. E. 435; Bowden v. Johnson, 107 U. S. 251; Bowden v. Santos, 1 Hughes, 158; McClaren v. Franciscus, 43 Mo. 557; Provident Savings Inst. v. Jackson Place Skating Rink, 52 Mo. 557; Cent. Agriculture, etc., Asso. v. Alabama Gold Life Ins. Co., 70 Ala. 120; Rider v. Morrison, 54 Md. 429; Madison v. Fireman's Ins. Co., 11 Rob. La. 177; Payne v. Stewart, 33 Conn. 517; Nathan v. Whitlock, 9 Paige, 152; Dauchy v. Brown, 24 Vt. 197; Roman v. Fry, 5 J. J. Marsh, 634; Veiller v. Brown, 18 Hun, 571; Westchester, etc., R. Co. v. Jackson, 28 Pa. St. 339; Aultman's Appeal, 98 Pa. St. 505; Arthur v. Midland R. Co., 3 Kay & J. 204; Muskingum Valley Turnpike Co. v. Ward, 13 Ohio St. 120. In England a contrary view prevails, and it is held that if the transfer to an insolvent or irresponsible party be absolute and without condition or secret trust in favor of the transferrer such transfer is valid. In re Taurine Co., 25 Ch. Div. 118; Chynoweth's Case, 15 Ch. Div. 13; William's Case, 1 Ch. Div. 576; King's Case, 6 Ch. Div. 196; Regina v. Midland Counties, etc., Ry. Co., 15 Ir. Ch. 525. See also Skrainka v. Allen, 76 Mo. 384.

[2] See Cox's Case, 4 De G. J. & S. 53; Pugh & Sherman's Case, L. R. 13 Eq. 566. But the insolvency must relate to the time of the transfer. If transferee afterwards becomes insolvent the vendor cannot be held. Harpold v. Stobart, 46 Ohio. St. 397; 21 N. E. 637; Infra, §§ 815-817.

spective of the rights of the members composing it at any particular period. Each share represents a fractional interest in all its assets, including its causes of action at the time he became a member. If a cause of action previously existing in favor of the corporation has become barred from any cause, it does not revive in favor of one who becomes a member afterwards. On the same principle the new member succeeds to the right and interest of the original member, and although, by reason of his acts or personal misqualification of himself, the transferee is not entitled to sue, he is still entitled to share the benefits of a recovery by or on behalf of the corporation in any action, whether arising before or after the transfer.[1]

A contrary view has been expressed in the United States Supreme Court and in Georgia, where it was held that a person who did not own stock at the time of fraudulent transactions complained of, or whose shares have not devolved upon him since, by operation of law, cannot maintain a suit to have such transactions declared illegal.[2]

§ **468. Knowledge of wrongs no bar to transferee.**— Mere knowledge that wrongs have already been committed for which the corporation is entitled to redress in an action would not deprive a transferee of his right to sue; nor would the fact that the vendor had barred

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[1] Ervin v. Oregon, etc., Ry. Co., 27 Fed. R. 625.

[2] Alexander v. Searcy, 81 Ga. 536; Hawes v. Oakland, 104 U. S. 450; Dimpfell v. Ohio, etc., R. R. Co., 110 Id. 209. In the last case Justice FIELD, speaking of plaintiff's efforts to induce the directors or stockholders of the corporation to begin suit as well as of his capacity to sue, said:—" The cause of his failure should be stated with particularity in his bill of complaint, accompanied with an allegation that he was a stockholder at the time of the transaction of which he complains, or that his shares have devolved upon him since, by operation of law."

himself alone bar a purchaser in good faith, unless the fact were known to him at the time.

And the acquiescence of the original holder in illegal acts of the managing agents will never bind a subsequent holder of that stock to submit to future acts, whether of a similar or of a different character.[1]

§ 469. Insolvency and dissolution terminate the right of transfer.—The right of transfer is given for the benefit of the members, but they will not be permitted to exercise it as a means of escaping their proportionate shares of losses resulting from failure of the enterprise, and cast it entirely upon their associates.

To prevent the injustice which would result from a contrary rule, it has been repeatedly held in the United States that after a corporation has become notoriously insolvent, the only duty remaining to its officers and members, is to wind up its business, call in the outstanding capital and satisfy its creditors. And even before the insolvency is made public, if it actually exists, to allow the shareholders to transfer their interests, and with them their liability to bear a share of the losses, to persons unable to contribute or beyond the jurisdiction of the courts, would be opening the door to subterfuges calculated to defeat the claims of creditors and defraud their associates. And upon principle it would seem that creditors might avoid such transfers made to their injury. There are a number of cases, however, which maintain the contrary.[2]

The right of transfer terminates on the dissolution of a corporation as upon insolvency, but for a different reason. Transfers after insolvency are disallowed upon

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[1] Bloxam v. Metropolitan Ry. Co., L. R. 3 Ch. 337; Infra, § 637.

[2] Johnson v. Laflin, 6 Cent. L. J. 131; Chouteau Spg. Co. v. Harris, 20 Mo. 382; Everhart v. Chester, etc., R. R. Co., 28 Pa. St. 339; 5 Dill. 76.

equitable grounds, but dissolution puts an end to all contracts of membership, and there exists nothing recognizable at law which can pass from one to another. A former member of a dissolved corporation may, however, assign his interest in the undistributed assets so as to give his assignee an equitable claim.[1]

§ 470. Compliance with regulations and formalities.— The provisions of the constating instruments, as we have seen, enter by implication into every contract of membership.[2] So a transfer of shares which is no more than the making of a new contract in place of one which existed previously, must be made in accordance with whatever reasonable and valid rules and regulations the articles and by-laws contain with reference to that transaction.[3]

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[1] James v. Woodruff, 10 Paige, 541; affirmed, 2 Denio, 574. See Allin's Case, L. R. 16 Eq. 449, 455; Chappell's Case, L. R. 6 Ch. 902, 905.

[2] Supra, § 283.

[3] Union Bank v. Laird, 2 Wheat. 390, per STORY, J.; Supply Ditch Co. v. Elliott, 10 Colo. 327; 16 P. 691; Northrop v. Newton, etc., Turnp. Co., 3 Conn. 544, per HOSMER, J.; Hibblewhite v. McMorine, 6 M. & W. 200; Merrill v. Call, 15 Me. 428; Bishop v. Globe Co. (G.), 135 Mass. 132; Fisher v. Essex B'k, 5 Gray, 373; Stockwell v. St. Louis Mercantile Co., 9 Mo. App. 133; Bates v. Boston, etc., R. R. Co., 10 Allen, 251; Cordon v. Universal Gas Light Co., 6 Dowl. & L. 379; State v. Pettinelli, 10 Nev. 141.

A by-law requiring the surrender of the old certificate before the issue of a new one is not an unreasonable restriction upon the right of transfer. It is a legitimate means of protecting the company from conflicting claims between legal and equitable owners, and to preserve any liens or claims it may have on its stock before transfer to third parties having no notice of such liens or claims. See Bank of Ky. v. Schuylkill Bank, Parsons' Sel. Cas. 180.

A by-law of a bank prohibiting the transfer of stock therein or interposing unreasonable restrictions is in restraint of trade and void. Moore v. Bank of Commerce, 52 Mo. 377.

A by-law of a national bank attempting to create a lien in favor of the bank on stock held by its debtors is not a regulation of the business of the bank, or a regulation for the conduct of its affairs within the meaning of the national banking act; but is a restriction and interference with the free exchange of personal property, and therefore not enforceable. Bullard v. Bk., 18 Wall. 589; Conklin v. Second Nat. Bk., 45 N. Y. 655. See also Rosenback v. Salt Spgs. Nat. Bk., Id. 512, note.

Until the corporation has notice of the assignment the assignor remains liable to pay all calls issued by it.[1]

But the assignee is not liable until compliance with the prescribed rules, although the company have notice of the assignment.[2] The registry is no protection to the corporation as against the default of its agent or officer whose duty it is to enter a transfer, but who fails to do so upon proper demand where the charter or general law declares the stock assignable.[3]

Where the law or charter or by-law enacted in pursuance of the same prescribes a mode of transfer, an assignment in a different form which would have been effectual at common law to pass the legal title to an assignable interest will not be valid.[4]

§ **471. Transfers in pledge.**—The same principles apply where the transfer is not absolute, but to secure a loan or other indebtedness. By the preponderance of authority, shares of stock in a corporation being merely choses in action are not the subject of mortgage ; but the certificates partake so far of the character of personal property as to be the subjects of pledge.[5] The transfer is often made with power of sale to the creditor,[6] the creditor thereby becoming the agent of the

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[1] Humble v. Langston, 7 M. & W. 517; Shellington v. Howland, 53 N. Y. 371; Worrall v. Judson, 5 Barb. 210; London, etc., Ry. Co. v. Fairclough, 2 Man. & Gr. 674; McEuen v. West London Wharves, etc., Co., L. R. 6 Ch. 655; Sayles v. Blane, 19 L. J. Q. B. 19; s. c., 6 Eng. Ry. Cas. 79; Midland, etc., Ry. Co. v. Gordon, 16 M. & W. 804; s. c., 5 Eng. Ry. Cas. 76; Dane v. Young, 61 Me. 160.

[2] Marlboro Mfg. Co. v. Smith, 2 Conn. 579.

[3] Stebbins v. Phœnix Fire Ins. Co., 3 Paige, Ch. 350.

[4] Union Bk. v. Laird, 2 Wheat, 390; Colt v. Ives, 31 Conn. 25; McEuen v. West London, etc., Co., L. R. 6 Ch. 655; Sayles v. Blane, 19 L. J. Q. B. 19.

[5] Dayton Nat. Bk. v. Merchants' Nat. Bank, 37 O. St. 208; Newton v. Fay, 92 Mass. 505; Merchants' Nat. Bk. v. Hall, 83 N. Y. 338.

[6] See Beckwith v. Burrough, 13 R. I. 294.

pledgor.[1] Even though the transaction take the form of a mortgage accompanied with delivery of the certificate, it will be treated as a pledge rather than as a mortgage.[2] A convenient method of pledging stock is by a delivery of the certificate with a blank power of attorney.[3]

A transfer on the books of the corporation is not essential[4] to the validity of the pledge as between parties, and it has been held that a mere delivery of the certificate without a written transfer is sufficient.[5] Nor is notice to the corporation required.[6] The usual method is to deliver the certificates endorsed in blank as in absolute transfers, accompanied by a memorandum in writing, setting forth the terms upon which the transfer is made and designating the shares held.[7]

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1 Vauppell v. Woodward, 2 Sandf. Ch. 143. A broker to whom shares are consigned for sale on a margin is pledgee; Baker v. Drake, 66 N. Y. 518; Markham v. Jaudon, 41 N. Y. 235; and is bound to the same duties and obligations to the pledgor.

2 Merchants' Bk. v. Cook, 4 Pick. 405; Doak v. Bk. of the State, 6 Ired. L. 309; Newton v. Fay, 92 Mass. 505; Mechanics', etc., Ass'n v. Conover, 14 N. J. Eq. 219; Nabring v. Bk. of Mobile, 58 Ala. 204. Compare Smith v. 49 and 56 Quartz Mining Co., 14 Cal. 242, where the court held the transaction to amount to a mortgage. See also, Manns v. Brookville Nat. Bank, 73 Ind. 243; Williamson v. New Jersey Southern R. R. Co., 26 N. J. Eq. 398. In Adderly v. Storm, 6 Hill, 624, the court held the transaction to be neither a pledge nor a mortgage. Compare Wilson v. Little, 2 N. Y. 443; Hasbrouck v. Vandervoort, 4 Sandf. 74. In Brewster v. Hartley, 37 Cal. 15, the court held that the fact that the transfer was formally reduced to writing did not constitute the transaction a pledge, holding also that unless the stock was expressly made assignable by the delivery of the certificates it could not be pledged in any other manner. See Thompson v. Holladay (Or.), 14 Pac. Rep., where a chattel mortgage on shares of stock made to the receiver who previously held the stock as receiver was held void.

3 Mechanics' Bank & L. Ass'n v. Conover, 14 N. J. Eq. 2.9; Lewis v. Graham, 4 Abb. Pr. 106.

4 Nabring v. Bank of Mobile, 58 Ala. 204; Wilson v. Little, 2 N. Y. 443.

5 See Jarvis v. Rogers, 13 Mass. 105; Brewster v. Hartley, 37 Cal. 15; Robinson v. Hurley, 11 Iowa, 410.

6 Crescent, etc., Co. v. Deblieux, 3 South. Rep. La. 72.

7 Pitot v. Johnson, 33 La. Ann. 1286; Finney's App., 59 Pa. St. 398; Broadway Bk. v. McElrath, 13 N. J. Eq. 24; Mount Holly, etc., Co. v. Ferree, 17 N. J. Eq. 117; Blouin v. Liquidators, etc., 30 La. Ann. 714; Merchants' Nat. Bank v. Richards, 6 Mo. App. 545; Aff'd 74 Mo. 77; Cornick v. Richards, 3 Lea, 1; New

A provision in the charter or by-laws for a different method of transfer does not affect the validity of a *bona fide* pledge made in the usual manner.[1]

§ **472. Blank assignments.**—The practice of assigning by a transfer duly signed by the transferee, but with the name of the transferee left blank, has become a commercial usage and is recognized as valid by the courts.[2] It is usual to have printed on the back of the certificate as part of the assignment a blank power of attorney empowering any one whose name may be inserted to fill in the name of any person he may select to make the transfer. Such assignment and power of attorney so signed may be sold and passed from hand to hand, each purchaser being entitled to the same rights against his transferrer and previous transferrers as he would have if their several names had been inserted. Whenever it may become necessary the last transferrer may fill up the blanks with his own name and the name of an agent as attorney to make the registry transfer, or, as is frequently done, the name of the

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Orleans Nat. Bkg. Ass'n v. Wiltz, 10 Fed. Rep. 330; Baldwin v. Canfield, 26 Minn. 43.

1 Pitot v. Johnson, 33 La. Ann. 1286; Dickinson v. Cent. Nat. B'k, 129 Mass. 279; Lightner's App., 82 Pa. St. 301; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Fraser v. Charleston, 11 S. C. 486; Factors' & R. Ins. Co. v. Marine D. D. Co., 31 La. Ann. 149; Continental Nat. Bank v. Elliott Nat. Bank, supra; United States v. Cutts, 1 Sumn. 133; Lowry v. Com. B'k, Taney, 310; Blouin v. Liquidators, etc., 30 La. Ann. 714; Com. Bank of Buffalo v. Kortright, 22 Wend. 348; Leitch v. Wells, 48 N. Y. 585; Otis v. Gardner, 105 Ill. 436.

2 Walker v. Detroit Transit Ry. Co., 47 Mich. 338; Penn. Ry. Co. App., 86 Pa. St., 80; Cutting v. Damerel, 88 N. Y. 410; German Un. Bank Ass'n v. Sendmeyer, 50 Pa. St. 67; Ex parte Sargent, L. R. 17 Eq. 273; Ortigosa v. Brown, 47 L. J. Ch. 168; Re Barread's Bkg. Co., L. R. 3 Ch. 105; McNeil v. Tenth Nat. Bank, 45 N. Y. 325, 331, holding that such assignment is good even in the absence of such usage; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616, 625. Where certificates of stock are transferable by indorsement in blank, and not on the books of the company, an offer by the holder to deliver them so indorsed is a sufficient tender. Hill v. Wilson (Cal.), 25 P. 1105; Wilson v. Hill, Id.

latter may be left blank to be filled with the name of the registry clerk.[1]

§ 473. Identity and proof of genuineness of signature.— The corporation may undoubtedly make and enforce reasonable rules and regulations with reference to identity of transferee with the person representing himself to be such and requiring proof of the signature of the transferrer. Without such power corporations would have no protection against forgeries and fraudulent practices of various kinds.[2]

A bank may take reasonable time to make inquiries and may require proof that the signature is the writing of the party whose signature it purports to be;[3] and in cases of doubt, as to the right of the person in whose

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[1] See Broadway Bank v. McElrath, 13 N. J. Eq. 24; Matthews v. Mass. Nat. B'k, 1 Holmes. 396; Bridgeport B'k v. N. Y. & N. H. R. R. Co., 30 Conn. 231; Kortright v. Buffalo Com. B'k, 20 Wend. 91; Otis Admin. v. Gardner, 105 Ill. 436; Mt. Holly L. & M. T. Co. v. Tenie, 17 N. J. Eq. 117; Prall v. Tilt, 28 N. J. Eq. 479; Leavitt v. Fisher, 4 Duer. 1, 20, Defendant, being the owner of shares of corporate stock, deposited the certificate with a trustee under an agreement with the other shareholders that the stock should not be taken out of his possession, or put on the market before a certain time, and took a receipt from the trustee reciting such facts. Afterwards he delivered the receipt to intervenor, with a power of attorney in blank, authorizing the transfer of the shares on the company's books; but he gave the intervenor no order for the delivery of the certificate, and no notice was given to the trustee of the transfer. *Held*, under Civil Code La., art. 3158, providing that "when a debtor wishes to pawn . . . stocks . . . he shall deliver to the creditors the . . . certificates of stock . . . so pawned," that there was no pledge of the shares as against an execution creditor of defendant. Bidstrup v. Thompson, 45 F. 452. See Batter's Appeal, 108 Pa. St. 510; 1 A. 78, holding that the name on the stock book is only *prima facie* evidence of ownership and of no avail against an opposing possession of the certificate together with such an executed power of attorney for its transfer.

[2] Tel. Co. v. Davenport, 97 U. S. 369; Davis v. Bank of Eng., 2 Bing. 393. A corporation having entered on its books a transfer of its shares signed by an agent, the corporation supposing the signature to be that of the principal, the entry of the transfer is justified if the agent was in fact authorized, but the corporation cannot rely on an estoppel arising from the principal's having held the agent out as authorized. Camden Fire Ins. Ass'n v. Jones, (N. J.), 21 A. 458.

[3] Davis v. Bank of Eng., supra; Bayard v. Farmers' & M. Bank, 52 Pa. St. 232.

name the stock appears on the books, to sell and transfer the same, it may require legal proof of competency. The same rule applies in the case of one representing himself to have and apparently having authority as attorney for the party. But the corporation has no right to inquire into the motive of one having legal authority to make the transfer.[1] Ordinarily, however, it cannot refuse to make the transfer on the ground that the transfer will injure the corporation, or that the object of the transfer is to increase the votes of the transferee.[2] In England the law is somewhat different. Directors there usually have a discretionary power to allow or refuse a transfer.[3]

§ **474. When transfer complete.**—The novation is not complete; nor is the assignee a shareholder for the purpose of voting and claiming dividends;[4] nor has he any equitable claim upon the assets in case of insolvency or dissolution as against the corporation and its creditors prior to giving notice of his claim.[5] But a formal assignment or transfer on the corporation books is not

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[1] Townsend v. McIver, 2 S. C. 25. A merely nominal transfer, however, made to obtain for the transferee certain special privileges, such as free admission to a place of amusement, would be without valid consideration and a fraud upon the other stockholders. Appeal of Academy of Music, 108 Pa. St. 510; In Rice v. Rockafeller, N. Y. Da. Reg., May, 1888, in an action to compel the unincorporated Standard Oil Trust to transfer on its books "trust" certificates which plaintiff had purchased, defendants alleged that plaintiff was a competitor of the trust and had purchased the certificates in order to break up the trust and compel it to put the plaintiff out. It was held the plaintiff should be compelled to give a bill of particulars.

[2] Moffatt v. Farquar, L. R. 7 Ch. D. 591.

[3] Healey on Law and Pr. of Companies, 79.

[4] Hall v. Rose Hill, etc., Road Co., 70 Ill. 673; People v. Robinson, 64 Cal. 373; Cleveland, etc., R. Co. v. Robbins, 35 Ohio St. 483; Oxford Turnp. Co. v. Bunne, 1; 6 Conn. 562; Northrop v. Newton, etc., Turnp. Co., 3 Conn. 544; Northrop v. Curtis, 5 Conn. 246; Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120.

[5] Becher v. Wells Flouring Mill Co., 1 McCrary C. C. 62; Bank of Commerce App., 73 Pa. St. 59; Brisbane v. Delaware, etc., R. R. Co., 25 Hun, 438.

essential to the substitution of the transferee for the transferrer to the rights of membership as between themselves, such entries being only evidence of the shareholder's right and not the right itself.[1]

§ 475. Waiver by corporation.—A corporation may waive its right to require transfers to be made upon its books.[2] But some unequivocal act must be shown in order to establish a waiver of the method prescribed by statute.[3]

And it may establish a usage of having the entry or evidence of the transfer kept elsewhere than in the books. When such usage and compliance with it are proven, the corporation is estopped from setting up that no registration was made in its books as the law or its by-laws require.[4]

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[1] Mitchell v. Beekmen, 64 Cal. 117; Rutter v. Kilpatrick, 60 N. Y. 604; Wheeler v. Miller, 90 N. Y. 353; Burr v. Wilcox, 22 N. Y. 551; Thorp v. Woodhull, 1 Sandf. Ch. 411; Johnson v. Albany, etc., R. R. Co., 40 How. Pr. 193; Chaffin v. Cummings, 37 Me. 83; Schaeffer v. Mo. Home Ins. Co., 46 Mo. 248; Chester Glass Co. v. Dewey, 16 Mass. 94; Boston & Albany R. R. Co. v. Pearson, 128 Mass. 445; Beckett v. Houston, 32 Ind. 393; Slipher v. Earhart, 83 Ind. 173; Haynes v. Brown, 36 N. H. 545, 563; Fulgam v. Macon, etc., R. R. Co., 44 Ga. 597; South Ga. & F. R. R. Co. v. Ayres, 56 Ga., 230; Minneapolis Harvester Wks. v. Libby, 24 Minn. 327.

[2] Isham v. Buckingham, 49 N. Y. 216.

[3] The holder of shares agreed to sell them to S., and placed the certificate in the hands of a third party to be delivered to the vendee on payment of a note given for the stock. The note was never paid and the stock remained on the books of the corporation in the name of the vendor. But S. voted on the stock by virtue of a proxy, and the note was subsequently taken by the corporation, but not on account of any transaction between it and S. It was held that S. was not liable to the corporation for unpaid assessments on the stock. Cornack v. Western White, etc., Co., 77 Ia. 32; citing Ft. Madison Lumber Co. v. Batavian B'k, 71 Ia. 270; Hale v. Walker, 31 Ia. 344; Pullman v. Upton, 96 U. S. 328. An employé who has not power to transact general business for the corporation has no implied power to waive its lien. Kenton Ins. Co. v. Bowman, 84 Ky. 430, holding also that the lien is not waived by merely taking other security.

[4] Walker v. Detroit Transit R. R. Co., 47 Mich. 338; Munn v. Barnum, 24 Vt. 283; Stewart v. Walla Walla Pub. Co. (Wash.), 20 P. 105; Noyes v. Spaulding, 27 Vt. 420; Richmondville Mfg. Co. v. Prall, 9 Conn. 487. See Elliston v. Schneider, 25 La. Ann. 435.

§ 476. Duty of parties to transfer.—On a sale of stock, it is the legal duty of both parties to the transaction to see that the transfer is properly registered.[1] It is the vendor's duty to do so for the information of those dealing with the corporation and to enable the vendee to collect dividends, vote in corporate affairs, etc., and it is the vendee's duty to have a legal transfer made at the only place where it can be done in order to relieve the vendor from liability to future calls. Since a court of equity will compel a transferrer of stock to record the transfer, and the transferee to pay all calls afterward, it is clear that the vendee may himself demand that the transfer be entered. When it is done at his request, he becomes responsible for future calls. The exercise of these rights and duties, however, does not interfere with the right of one who appears to be a stockholder on the books of the company to show that his name appears there without right and without authority.[2]

The mere fact that the assignor is indebted to the corporation will not justify a refusal on the part of its officers to make the proper transfer upon the books, unless the company had a lien upon the stock at the date of the transfer.[3]

§ 477. Where the corporation claims a lien upon the shares.—As to whether a by-law creating a lien upon shares for all indebtedness of the shareholder to the corporation can be enforced against a *bona fide* purchaser without notice of prior liens, without additional statutory authority than that authorizing it to make rules and reg-

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1 Poole v. W. P. B., etc., Ass'n, 30 F. 514; Bells App. (Pa.), 18 A. 177.

2 Upton v. Webster, 91 U. S. 65. See Green Mt. T. Co. v. Bulla, 45 Ind. 1.

3 People v. Crockett, 9 Cal. 112; Driscoll v. West Bradley Mfg. Co., 59 N. Y. 102; Williams v. Lowe, 4 Neb. 398; Steamship Co. v. Henon, 52 Pa. St. 280; Byon v. Carter, 22 La. Ann. 98; Vansand v. Middlesex Co. Bank, 26 Conn. 144.

ulations concerning transfers, there has been considerable conflict of authority.[1]

There is a long line of decision in favor of the corporation's right to pass and enforce such a by-law. There are many respectable authorities against the right.[2]

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[1] Pendergast v. Bank, 2 Sawy. C. C. 108; Bank of Attica v. Mfrs. Bank, 20 N. Y. 501; Vicksburg, etc., R. R. Co. v. McKeen, 14 La. Ann. 724; Plymouth Bank v. B'k of Norfolk, 10 Pick. 454; Mechanics' Bank v. Mer. B'k, 45 Mo. 513; Tuttle v. Walton, 1 Ga. 43; McDowell v. B'k of Wilmington, 1 Harr. (Del.) 27; St. Louis Ins. Co. v. Goodfellow, 9 Mo. 149; Nesmith v. B'k of Wash., 6 Pick. 329; Reading F. Ins. & T. Co. v. Reading I. W. (Pa.), 21 A. 170, holding that an indebtedness created by a stockholder who drew money from the company in excess of the amount due him as profits, becomes a lien on the stock of such person by virtue of a by-law, to which he assented, that if any indebtedness of a stockholder to the corporation was not paid by a given time, his stock might be applied to its payment, and the statute does not run against such lien when the debt is not paid. Knight v. Old Nat. B'k, 3 Clifford, 429; McDowell v. B'k of Wilmington, 1 Harr. (Del.) 27; Bank of Holly Spgs. v. Pierson, 58 Miss. 421; St. L. Perpet. Ins. Co., 9 Mo. 149; Mechanics' Bk. v. Mer. Bank, 45 Mo. 513; Surplock v. Pac. R. R. Co., 61 Mo. 319; In re Buckman, 12 Nat. Bank, Reg. 223; People v. Crockett, 9 Cal. 112; Pendergast v. B'k of Stockton, 2 Sawy. 108; Lockwood v. Mechanics' Nat. Bank, R. I. 308; Cunningham v. Ala., etc., Trust Co., 4 Ala. (N. S.) 652; Geyer v. West. Ins. Co., 3 Pittsb. 41; In re Dunkerson, 4 Biss. 227; Young v. Vaugh, 23 N. J. Eq. 325; Brent v. Bank of Wash., 10 Pet. 596, 615; Child v. Hudson Bay Co., 2 P. Wms. 207; Planters' Ins. Co. v. Selma Sav. B'k, 63 Ala. 585. See Heart v. State Bk., 2 Dev. Eq. N. C. 111; Farmers', etc., Bank v. Warson, 48 Ia. 336, 340; Tuttle v. Walton, 1 Ga. 43.

In Pendergast v. Bank of Stockton, 2 Saw. C. C. 108, SAWYER, J., after ably discussing previous decisions, summarized the law on the question as follows: "Upon the whole, after a careful consideration of the statute and the authorities, I am of the opinion that the provision of the fourth section authorizing the corporation to make by-laws for the management of its property, the regulation of its affairs and the transfer of its stock, and of the ninth section, that the stock of the company shall be transferable in such manner as shall be prescribed by the by-law of the company, etc., authorized the corporation to adopt the by-law in question and that the by-law is valid."

[2] In Anglo-Cal. Bank v. Grangers' Bank, 63 Cal. 359, the question came directly before the court, and after a consideration of all the recent cases on the subject, the court expressly approved the doctrine of the cases cited by it against the validity and unforceability of such a by-law and said:—"The defendant might make by-laws regulating the transfer of stock, but it could not, under the power to regulate the transfer of stock, create a secret lien upon it, which would adhere to it in the hands of a *bona fide* purchaser without notice. We think that the by-law which it is claimed gives the defendant such lien is clearly inconsistent with the provisions of sec. 324 of the Civil Code, etc.

§ 478. **The weight of authority favors the right.**—But the weight of authority and of reason is still in favor of the right under statutes empowering corporations to enact by-laws regulating transfers of stock.[1] The argument that the public should not be ensnared by secret liens may well apply to negotiable instruments; but in the case of certificates of shares in a corporation, the books are at all times open to the inspection of intending purchasers, and the law points out the place for ascertaining beyond cavil whether any such liens exist. If the agents of the corporation should refuse to give the information sought, or should misrepresent the terms upon which the shares are held, it would be of course estopped from afterwards setting up such lien against the purchaser; and he would take them subject to no claim against him, and just as if no lien existed.

The conclusion drawn from all the best considered and ably discussed cases is that, under such statutory provisions as we have been considering, the corporation

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The doctrine of this case is supported by the following authorities:—Driscoll v. West Bradley, etc., Co., 59 N. Y. 96; Bank of Attica v. Mfrs. Bk., 20 Id. 501; Rosenback v. Salt Springs Nat. Bank, 53 Barb. 495; Leggett v. Bank of Sing Sing, 24 N. Y. 283; Arnold v. Suffolk B'k, 52 Barb. 424; Byron v. Carter, 22 La. Ann. 98; Pitot v. Johnson, 533 Id. 128; N. O. Bkg. Ass'n v. Wiltz, 4 Woods, 43; Planters', etc., Mut. Ins. Co. v. Selma Sav. Bk., 63 Ala. 585; Steamship Dock Co. v. Henon's Admin., 52 Pa. St. 280; Merchants' Bk. v. Shouse, 102 Pa. St. 488; Bank of Holly Spgs. v. Pinson, 58 Miss. 421; Carroll v. v. Mullanphy Sav. B'k, 8 Mo. App. 249; Evansville Nat. Bank v. Met. Nat. B'k, 2 Biss. 527; Lee v. Cit. Nat. Bk., 2 Cin. Sup. Ct. 298; Bank v. Lanier, 11 Wall. 69; Bullard v. B'k, 18 Id. 589.

In Plymouth Bank v. Bk. of Norfolk, 27 Mass. 454, the validity of a by-law giving a lien in favor of a bank on its own stock is strongly questioned; and in Sargent v. Franklin Ins. Co., 25 Mass. 90, still stronger ground is taken against it. In Conklin v. Sec. Nat. B'k, 53 Barb. 512 it was held that the insertion in the certificate of a provision to the effect that the stock was not transferable until all the liabilities of the stockholder to the bank were paid, did not give the bank a lien upon the shares for the subsequent indebtedness of the share owner. This case is not in conflict with Jennings v. Bank of Cal., 79 Cal. 323. In that case the indebtedness of the shareholder had been already incurred.

[1] Supra, n. 1, p. 517.

may enact by-laws having reference to the security by way of lien on its outstanding shares of stock for any indebtedness of the stockholders; that such lien does not prevent the holder from transferring his certificate; that the assignee takes the shares evidenced by it, subject to all liens existing in favor of the corporation; and that in order to complete his legal title and vest him with the right to vote and receive dividends, the transfer must be registered in the books of the corporation in conformity with the statute and all reasonable by-law regulations not repugnant to it.

§ **479. No common law lien.**—There was no lien in favor of the corporation upon shares at common law. The allowance of such lien would have subverted the policy of the common law against secret liens. Therefore, liens for debts due the corporation must be allowed by statute or provided for in by-laws under statutory authority, unless there is a binding usage or custom of which the party denying the right to enforce the lien has notice, actual or constructive. Without such notice the validity of a lien in favor of manufacturing, trading, and other corporations not engaged in the business of loaning money has been generally denied.[1]

But the common law rule only has application in the case of *bona fide* purchasers of the shares without notice. The common law rule could not attach to dividends declared and set apart. They are considered as so much money in the possession of the corporation

[1] Case v. Bank, 100 U. S. 446; Sargent v. Franklin Ins. Co., 8 Pick. 90; Kenton Ins. Co. v. Bowman, 84 Ky. 430; Heart v. State Bank, 2 Dev. Eq. 111; Dana v. Brown, 1 J. J. Marsh, 304; Bank of Attica v. Mfrs., etc., Bank, 20 N. Y. 505; Driscoll v. West Bradley, etc., Mfg. Co., 59 Id. 96; Hill v. Pine River B'k, 45 N. H. 300; People v. Crockett, 9 Cal. 112; Anglo-Cal. Bank v. Grangers Bank, 63 Id. 359; People v. Miller, 39 Hun, 557; Bank of Louisville v. Nat. State Bank, 10 Bush. Ky. 367; Del., etc., R. R. Co. v. Oxford Iron Co., 38 N. J. Eq. 340; Steamship Doc. Co. v. Heron, 52 Pa. St. 280.

belonging to the stockholder pledged toward the payment of any just debt then due from him.[1] But the lien on dividends does not hold good after the death of a shareholder. The dividend must then go into the general fund for the payment of creditors, and the corporation takes its place in the order of payment with others.[2] Without it is so provided in the articles, statute or by-laws, or by special agreement, the corporation acquires no lien as against a shareholder on his shares, even though it hold his note for the debt due from him.[3]

§ 480. **By-law regulations under statutory authority.**— The object of a special or general statute in requiring that shares shall "be transferable only on the books of the company" is not only to enable the corporation to know who are its shareholders and as such entitled to vote, receive dividends, etc., but for the protection of *bona fide* purchasers of the shares and of creditors and persons dealing with it as well.[4]

In some states where shares are not expressly made transferable by indorsement and delivery, the members in their articles of incorporation may confer upon the directors discretionary power to approve or disapprove transfers. In such cases they are not bound to disclose

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1 Hagar v. Union Nat. Bank, 63 Me. 509.

2 Brent v. Bank, 2 Cranch, 517.

3 Bates v. N. Y. Ins. Co., 3 Johns. Cas. 238. And the common law rule against secret liens has been held not to apply where there was a known usage of a bank by which the stock of a debtor was not transferable until his indebtedness to the bank was paid. Such usage is binding upon the assignee of the stockholder, and it was his duty to make inquiry with reference to the condition of the account between the latter and the bank. Morgan v. Bank of North Am., 8 Searg. & R. 73; nor where a notice that a lien would be claimed for all indebtedness of the holder of the stock was printed on the back of the certificate to which attention was called on its face. Jennings v. Bank of Cal., 79 Cal. 323.

4 Moore v. Bank of Commerce, 52 Mo. 377; Weston's Case, L. R. 4 Ch. 20; Chouteau Spg. Co. v. Harris, 20 Mo. 382; Johnson v. Laflin, 5 Dill. 75–78; Gilbert's Case, L. R. 5 Ch. 559.

their reasons for the exercise of their authority; but they are not allowed to withhold their assent capriciously or in bad faith.[1]

§ 481. Construction of statutes authorizing the retention of lien on shares.—It is well settled that when a lien upon the shares of stockholders is given by statute or provided for in by-laws enacted under statutory authority to regulate, it extends, or may be made to extend to all debts, whether payable presently or at a future time, except where the statute limits the lien to debts actually due and payable, and that a stockholder indebted to a corporation, although the debt may not be due, cannot transfer his stock freed from such lien without the consent of the corporation.[2]

The lien continues for the benefit of the corporation after the debt has become barred by the statute of limitations,[3] and whether the stockholder's debt accrued after or before the debtor became a stockholder.[4] It attaches to a debt to which the shareholder is liable only

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[1] Poole v. Middleton, 29 Beav. 646; Robinson v. Chartered Bank, L. R. 1 Eq. 32; Re Stanton Iron, etc., Co., L. R. 16 Eq. 559; Pender v. Lushington, L. R. 6 Ch. D. 70; Penny's Case, L. R. 8 Ch. App. 446.

[2] Pittsburgh, etc., R. R. Co. v. Clarke, 29 Pa. St. 146; Grant v. Mechanics' Bank, 15 Serg. & R. 140; Sewall v. Lancaster B'k, 17 Id. 285; Rogers v. Huntington B'k, 12 Searg & R. 77; In re Bachman, 12 Nat. Bank Reg. 223; Downes Admin. v. Zanesville B'k, Wright, O. 447; Brent v. Bank of Wash., 10 Pet. 596; McCready v. Ramsey, 6 Duer. 574; St. Louis Perpet. Ins. Co. v. Goodfellow, 9 Mo. 149; Cunningham v. Ala., etc., Trust Co., 4 Ala. (N. S.) 652; Hall v. U. S. Ins. Co., 5 Gill. (Md.) 484; Leggett v. Bank of Sing Sing, 24 N. Y. 283; In re Stockton Malleable Iron Co., L. R. 2 Ch. D. 101. Under the Penn. Stat. of 1814 it was held that a bank might lawfully refuse to permit the transfer of the stock of a stockholder who had drawn a bill which had been discounted by the bank but not payable at the time the transfer was demanded, both the drawer and his indorser having become insolvent since the discount of the bill. Grant v. Mechanics' Bank, 15 S. & R. (Pa.) 140. See also Reese v. Bank of Commerce, 14 Md. 271.

[3] Farmers' Bank of Md. v. Inglehart, 6 Gill. 50; Geyer v. Western Ins. Co., 3 Pittsb. 41; Brent v. B'k of Wash. 10 Pet. 596.

[4] Schmidt v. Hennepin, etc., Co., 35 Minn. 511.

as surety. It extends to debts due from a partnership of which the stockholder is a member.[2] It is well settled by a long line of English as well as American authorities that unpaid calls in original subscriptions may be secured by such by-laws.[3] But no lien can attach to uncalled-for subscriptions except where, upon insolvency, the creditors have an equitable lien.[4]

Such provision in the by-laws of a bank is not an unreasonable restraint upon alienation of personal property, but is within the purview of a reasonable requirement for its benefit and protection.[5] But a provision in the charter of other than banking corporations giving a lien upon shares does not authorize the making of loans to the stockholders.[6]

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[1] McLean v. Lafayette Bank, 3 McLean, 587; Leggett v. B'k of Sing Sing, 24 N. Y. 283; Union Bank of Georgetown v. Laird, 2 Wheat. 390; McDowell v. Bank of Wilmington, 1 Harr. (Del.) 27. See Miles v. New Zealand, etc., Co., 54 L. T. Rep. 582.

It was held in Union Bank v. Laird, supra, that a corporation on discounting a bill or note may take security from one of the parties and also hold the shares of another party as security for the same loan. See also Conant v. Seurce Co. Bank, 1 O. St. 298; Helen v. Swigett, 12 Ind. 194; Dunlap v. Dunlap, L. R. 21 Ch. Div. 583.

[2] In the Matter of Bigelow, 2 Benedict (N. Y.), 469; Geyer v. Western Ins. Co., 3 Pittsb. 41; Arnold v. Suffolk Bank, 27 Barb. 424; Planters', etc., Ins. Co. v. Selma Sav. Bank, 63 Ala. 585.

[3] See Pittsburgh, etc., R. R. Co. v. Clarke, 29 Pa. St. 146; Rogers v. Huntington B'k, 12 S. & R. 77; Petersburg Sav., etc., Co. v. Launden, 75 Va. 327; Hall v. U. S. Ins. Co., 5 Gill. (Md.) 484, 499; Spurlock v. Pac. R. R. Co., 61 Mo. 319; McCready v. Ramsey, 6 Duer. 574.

[4] Hall v. U. S. Ins. Co., 5 Gill. (Md.) 484. See Infra, § To allow it would be to entirely destroy the transferable character of shares.

[5] Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585; Cross v. Phœnix Bank, 1 R. I. 39; Bank of Utica v. Smalley, 2 Cowen, 770; Mt. Holly Paper Co. App., 99 Pa. St. 513; Bishop v. Globe Co., 135 Mass. 132. Contra, Anglo-Cal. Bank v. Grangers' Bank, 63 Cal. 359. But the bank has no lien for debts not yet due where the terms used in giving the lien are for all debts actually due and payable to the corporation. Reese v. Bank of Com., 14 Md. 271. Nor has a corporation any right to refuse a transfer on the ground that subscriptions on the shares remain unpaid if no calls have been made for the balance due. The balance is not a debt due the corporation prior to its being called for. Kahn v. St. Joseph, 70 Mo. 262.

[6] Webster v. Howe Mach. Co., 54 Conn. 394. A statute prohibiting banks,

§ 482. Inconsistency of authority with general law not regarded.—A provision in a charter declaring the stock of a corporation personal property, and empowering the directors to make rules and regulations governing its transfer, will be given effect to the extent of authorizing the board to prohibit transfers of stock until all debts due by the holder to the corporation are paid, notwithstanding the inconsistency of such prohibitory provision with the general law of the state governing the transfer of personal property. And this will hold true although such charter provide that the rules and regulations to be made under its authority shall be subject to the general law of the state.[1] But an attaching creditor has a lien upon the shares superior to that of the corporation for an indebtedness incurred by the shareholder to it subsequently to the attachment.[2]

§ 483. Such by-laws confined in their operation to the immediate parties.—Where the by-laws of a company, which by its charter it is authorized to enact, give it a lien upon shares until all indebtedness is paid, they will not extend to the creation of a lien in favor of third parties to whom the shareholder is indebted, although the corporation may have acquired an interest

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organized under the laws of the state, from making loans or discounts on the security of the shares of their capital stock, is effectual to prevent a bank from having a lien on the shares of a stockholder for a debt thus created after that enactment, though a by-law before adopted had provided for such a lien. Nicollet Nat. Bank v. City Bank, 38 Minn. 85; 35 N. W. 577.

[1] St. Louis Perpet. Ins. Co. v. Goodfellow, 9 Mo. 149. SCOTT, J., delivering the opinion, said:—"In saying that the rules and restrictions on the transfer of stock should be subject to the general law, the legislature could not have intended that they should be consistent and in conformity with the law of the state governing the subject matter concerning which the by-laws were to be enacted. It could only have been contemplated by the legislature that they should be reasonable and not contravene the general laws other than that relative to the subject about which they were prescribed." See also Bank v. Mer. Bank, 45 Mo. 513.

[2] Geyer v. Western Ins. Co., 3 Pittsb. (Pa.), 41.

in or control of such claim.[1] It does not attach to a subsequently acquired equitable interest, but is confined to the legal interest of the corporation.[2]

§ 484. **What constitutes notice to transferee of lien of corporation.**—Where a lien is given directly by general law, all persons, even non-residents, are bound to take notice of such lien.[3] But the power given to enact a by-law creating a lien does not imply the power to bind those who have no knowledge, actual or constructive, of such by-law; and if the corporation wishes to preserve its rights under such by-laws, it must bring them in some practical way to the attention of all who have occasion to deal in its shares. A corporation cannot enforce a by-law creating a secret lien.[4]

As we have seen, the preponderance of judicial decision is largely in favor of the binding effect of such by-law upon all who buy shares with notice of it, and to the effect that in such case the party is bound to exert reasonable diligence in ascertaining the existence, nature and extent of liens upon notice that the corporation has such by-law provisions.[5]

Evidently a reference on the face of the certificate to a by-law or provision in the articles requiring the liquidation of all the holder's indebtedness to the corporation before a transfer would be amply sufficient to place the intended purchaser upon inquiry; and unless he made investigation at the proper place he would be

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[1] Child v. Hudson Bay Co., 2 P. Wms. 207; 1 Strange, 645.

[2] Child v. Hudson Bay Co., supra. But a firm succeeding to the business of a stockholder who became a member of such firm is chargeable with notice of the lien of the corporation in which such stock is held. Planters', etc., Mut. Ins. Co. v. Selma Sav. Bank, 63 Ala. 585. It was held in the same case that the lien of the bank on the stock under the by-laws extended to indebtedness of the succeeding firm in subsequent transactions between it and the bank.

[3] Hammond v. Hastings, 134 U. S. 401.

[4] Anglo-Cal. Bank v. Grangers' Bank, 63 Cal. 359.

[5] Jennings v. B'k of Cal., 79 Cal. 323, supra, § 478.

held to contract with reference to and knowledge of his vendor's indebtedness.[1]

But a provision giving a lien in favor of a bank for debts due, will not be extended so as to embrace debts to become due in the future as against an assignee of a certificate containing express reference to the articles.[2]

Notice in the case of liens for indebtedness is a fact to be proven in a case arising between corporations and purchasers, as in other cases, each case depending to a great extent upon its own circumstances and resting upon general principles.

§ **485. Waiver of the lien on stock.**—The lien which a corporation has upon shares of stock. whether acquired under statute or by-laws or otherwise, may be lost by acts showing a clear intention to waive it.[3] The lien is released by permitting a transfer of the stock to a stranger, and delivery to him of a certificate reciting that the shares are transferable when the liabilities of the holder to the corporation are paid.

But the waiver will not be inferred from equivocal or

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1 Jennings v. Bank, 79 Cal. 323.

2 In a case where a bank had refused to transfer a stockholder's shares on the ground of his indebtedness, it appeared that the latter had given the bank his note for a considerable amount, but at the time of the assignment the note was not yet due. The court, in deciding against the right of the bank to refuse to register the transfer, said:—"When a man gives his note payable at a future day, it is an essential part of the contract that he shall not be called on to pay it, and shall in no respect be molested in relation to it, until the day shall arrive, and then he is pledged to pay it. This is the contract; and why should we say that a dealer with this bank is subject to greater liabilities and exposed to more severe restrictions than attach to any similar indebtedness to other persons?" Leggett v. Bank of Sing Sing, 25 Barb. 326.

3 Bishop v. Globe Co., 135 Mass. 132; Nat. Bank v. Watsontown Bank, 105 U. S. 217; Johnson v. Laflin, 103 Id. 800; Presby. Cong. v. Bank, 5 Barr. 345; Upton v. Burnham, 3 Biss. 431; Hill v. Pine River Bank, 45 N. H. 300; Nesmith v. Wash. Bank, 6 Pick. 324; Hall v. U. S. Ins. Co., 5 Gill. 484; First Nat. Bank of Hartford v. Hartford Ins. Co., 45 Conn. 22; B'k of Am. v. McNeil, 10 Bush. (Ky.) 54; Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co., 16 Md. 466; Young v. Young, 23 N. J. Eq. 325.

other acts by which innocent third parties have not been misled. A corporation is not estopped from asserting its lien by declarations of the person in charge of the transfer book, upon presentation of the certificate by the holder requesting a transfer, unless it appear that the person in charge had other authority than that of receiving requests and communicating them to the proper officers.[1]

And a lien on stocks for debts due by the stockholders is not lost by the consent of the corporation that it may be transferred for the benefit of creditors to the assignee of the owner. The assignee in such case stands in no better situation than the assignor, neither he nor the creditors represented by him standing in the relation of purchasers for value without notice.[2]

§ 486. **An equitable lien may be acquired.**—An equitable lien arising from an implied contract may arise from a transfer even where there is no by-law nor any authority of law to adopt a by-law imposing a lien. An equitable lien does not depend upon the existence of a by-law or usage, but rests in contract. In such case the fact that there is no by-law or that the corporation has no power to make such a by-law, and that there is no usage in regard to the matter, is immaterial.[3]

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1 Bishop v. Globe Co., 135 Mass. 132.

2 Dobbins v. Walton, 37 Ga. 614. If the certificate contain a statement of another condition omitting all reference to the requirement of indebtedness, as if it state, for instance, that no transfer will be made on the books except upon return of the certificate, an assignee of it without notice of such by-law and for value acquires a permanent equity over the bank in the stock represented by such certificate. Lee v. Cit. Nat. Bank, 2 Cinn. (Ohio) 298.

3 Jennings v. Bank of Cal., 79 Cal. 329. See also Taylor v. Weston, 77 Cal. 534; Vansands v. Middlesex Bank, 26 Conn. 144; Waln v. Bank of N. Am., 8 Searg. & R. 89; In the case of Anglo-Cal. Bank v. Grangers' Bank, 63 Cal. 359, no condition was embodied in the certificate, and the by-law relied upon was not referred to therein or printed thereon.

§ **487. Transferee not prejudiced by default of agents of the corporation.**—It would be obviously unjust if, after the purchaser of shares had performed his whole duty, in regard to having the transaction legally evidenced and recorded, he should be prejudiced by any neglect on the part of the agent of the corporation, or affected by any equities which might subsequently arise between it and the assignor or third parties. Where the transaction is completed by entry in the registry book of the company so as to pass a complete legal title, another party to whom the secretary issues another new certificate acquires no title to the shares.[1] But if, in such cases, the assignee of the certificate should neglect, for an unreasonable time after giving notice, to register the transfer, he might lose his stock by a transfer fraudulently effected by the registered holder on the books of the company to a *bona fide* purchaser; but he would have an action against the corporation for allowing such a transfer in violation of his rights.[2]

§ **488. Transfers of shares in national banks.**—Shares in the capital stock of associations under the national banking law are salable and transferable at the will of the owner. They are in that respect like other personal property. The statute under which they are organized recognizes this transferability, although it authorizes every association to prescribe the manner of transfer, but does not allow the retention of a lien on the stock to secure a general debt due from the holder thereof.[3]

Purchasers and creditors, in the absence of other

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[1] H. & T. etc., Ry. Co. v. Van Alstyne, 56 Tex. 440. The rule applies to national banks. Hayes v. Shoemaker, 39 F. 319; Hayes v. Yawger, Id. 912.

[2] McNeil v. Tenth Nat. Bank, 46 N. Y. 325.

[3] Goodbar v. City Nat. Bank, Tex., 14 S. W. 851.

knowledge are only bound to look to the books of registry of the bank. But as between the parties to the sale, it is enough that the certificate is delivered with authority to the purchaser or any one he may name to transfer it on the books of the company. If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of them.[1]

§ 489. **Whether an unregistered transferee holds the legal or an equitable title.**—In a majority of the cases having reference to particular statutes, the title held by the assignee prior to having the entry made is equitable.

In the state of New York the contrary may be considered the settled doctrine, having been so adjudicated in several cases coming before the courts of last resort.[2]

§ 490. **The question complicated by conflicting decisions.**—No general assertion as to what title the assignee

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[1] Johnson v. Laflin, 103 U. S. 800; Bank v. Lanier, 11 Wall. 369; Webster v. Upton, 91 U. S. 65; Bank of Utica v. Smalley, 2 Cow. N. Y. 770; Gilbert v. Manchester, etc., Co., 11 Wend. 627; Commercial Bank of Buffalo v. Kentright, 22 Id. 348; Sargent v. Franklin Ins. Co., 8 Pick. 90. In Swift v. Smith, 65 Md. 428, it was held that the proper remedy was in the form of an action against the corporation to perpetuate testimony.

[2] In McNeil v. Tenth Nat. Bank, 46 N. Y. 325, RAPALLO, J., delivering the opinion, said:—"It has been settled by repeated adjudications that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be only on its books; that such provisions are intended solely for the protection of the corporation and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections." See also Broadway Bank v. McElrath, 2 Beasly (13 N. J. Eq.), 24; Rogers v. Stevens, 4 Halst. Ch. 167; Fatman v. Lobach, 1 Duer, 361; Leavitt v. Fisher, 4 Duer, 1. Compare Swift v. Smith, 65 Md. 428; 5 A. 534.

acquires, whether the legal or equitable, passes by the assignment before registration where the question is not settled by statute can be ventured. "It is often supposed, for example, that the right of a creditor to seize stock which has been sold before it is transferred upon the books depends upon the passing of the legal title; but we shall attempt to prove that the legal title has in reality no effect upon the matter."[1]

§ 491. **Wager sales.**—A transfer may be invalid, not by reason of any fraudulent consequences which would result to either of the parties or others by allowing it to stand, but because its recognition would be contrary to good morals or public policy. Of this nature are executory contracts for the sale of stock, without an intent to deliver the same, but upon an understanding that cash shall be paid equal to the amount lost or won in case the market price within a specified time rises above or falls below a given price. All such contracts

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[1] Lowell on Transfers of Stock, 105. The following decisions sustain this view:—Cherry v. Frost, 7 Lea, 1; State v. Leete, 16 Nev. 242, 250; Ross v. Southwestern R. Co., 53 Ga. 514, 532; Noyes v. Spaulding, 27 Vt. 420; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Eastman v. Fiske, 9 N. H. 182; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454, 463; s. c. 74 Mo. 77; Leitch v. Wells, 48 N. Y. 585; Grymes v. Home, 49 N. Y. 17; Cushman v. Thayer Mfg. Co., 76 N. Y. 365; and in the following an opposite view is taken:—Williams v. Mechanics' Bank, 5 Blatch. 59; Vansands v. Middlesex Co. B'k, 26 Conn. 144; Union Bank v. Laird, 2 Wheat. 390; Lowry v. Commercial B'k, Taney, 310; Blanchard v. Dedman Gas Co., 12 Gray, 213; Weyer v. Sec. Nat. B'k of Franklin, 57 Ind. 198; McCoury v. Suydam, 5 Halst. 245; Mechanics' Bank v. N. Y., etc., R. R. Co., 13 N. Y. 599; N. Y. etc., R. R. Co. v. Schuyler, 38 Barb. 534; Lockwood v. Mech. Nat. Bank, 9 R. I. 308, 331, 335.

United States v. Vaughn, 3 Binn. 394; Sibley v. Quinsigamond Nat. B'k, 133 Mass. 515; Otis v. Gardner, 105 Ill. 436; State v. First Nat. Bank of Jeffersonville, 89 Ind. 302; Planters' & Mer. Ins. Co. v. Selma Sav. B'k, 63 Ala. 585; Kellogg v. Stockwell, 75 Ill. 68; White v. Salisbury, 33 Mo. 150; Conant v. Seneca Co. B'k, 1 O. St. 298; Boatmen's Ins. Co. v. Able, 48 Mo. 136; B'k of Commerce App., 73 Pa. St. 59.

when construed to amount to wager or gambling transactions, are illegal and unenforceable. There is no difficulty in ascertaining the law governing them, but it is not always an easy matter to determine when a given "deal" in a stock falls within the definition of a gambling contract. The test to be applied in determining whether a contract of sale is a wager or not is whether there is an intent to deliver the property sold.[1]

The former rules on this subject in England and the United States were directly antagonistic. At common law in England it was held that such contracts, though wagers, were not void, while generally in this country all wagering contracts are held to be illegal and void as against public policy. But now by statute[2] the common law is changed in this respect, and such contracts are viewed alike in both countries.[3]

In many of the states are found statutes defining gambling contracts for the sale of stock and prohibiting them. Such statutes are only declarations of the common law as long recognized by courts in this country.[4]

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[1] Roundtree v. Smith, 108 U. S. 269; In re Hunt, 26 Fed. Rep. 739. "Where the parties to a contract in the form of a sale agree expressly or by implication at the time it is made that the contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference between market price and the contract price at a given time in the future such a transaction is a wager." Dewey on Contr., Fut. Del. & Com. Wag. 10. See also Wand v. Vosburg, 31 Fed. Rep. 12; Sandheim v. Gilbert (Ind.), 18 N. E. Rep. 687.

[2] 8 and 9 Vict., ch. 109, sec. 18.

[3] Irwin v. Williar, 110 U. S. 499, 508; Dickson's Extr. v. Thomas, 97 Pa. St. 278; Gregory v. Wandell, 40 Mich. 432; Lyon v. Culbertson, 83 Ill. 33; Melchert v. Am. Un. Tel. Co., 3 McCrary, 521; Barnard v. Backhaus, 52 Wis. 593; Love v. Harvey, 114 Mass. 80; Embrey v. Jennison, 131 U. S. 337. For distinctions between speculation and gambling, see Clark v. Foss, 7 Biss. 540; Smith v. Bouvier, 70 Pa. St. 325; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Hatch v. Douglas, 48 Conn. 116; Flagg v. Baldwin, 38 N. J. Eq. 219; Kent v. Miltengerger, 13 Mo. App. 503.

[4] The following cases refer to and construe statutes on the subject in the states where they respectively arose:—Kingsbury v. Kirwan, 77 N. Y. 420; Harris v. Turnbridge, 83 N. Y. 92. Under the Mass. Stat.—Howe v. Stockweather, 17 Mass. 243; Durant v. Burt, 98 Id. 161; Colt v. Clapp, 127 Id. 476;

§ **492. Same further considered.**—Whether there is an intent to make actual delivery or only to pay the margin between the nominal and the market value being the test, it is generally a question of fact for the jury [1] to determine upon all the circumstances surrounding the transaction.[2] It does not render the contract a wager that one party has no intention that there shall be an actual delivery. If one party so intends it is sufficient.[3] Transactions may be carried on upon a margin and still with an intention to deliver. The intention governs the character of the transaction in such cases as in others.[4] It is a question of evidence in each case however, and

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U. S. v. Vaughan, 3 Binn. 394; Pratt v. Am. Bell Tel. Co., 5 N. E. Rep. 307; Illinois—Wolcott v. Heath, 78 Ill. 433; Pickering v. Cease, 79 Ill. 328; Cole v. Milmine, 88 Ill. 349; Osgood v. Bander, 39 N. W. Rep. 887. In Pratt v. Am. Bell Tel. Co., supra, it was held that under the stock jobbing act, Pub. St. Mass. c. 78, sec. 6, forbidding the sale of stock in corporations where the party contracting to deliver has not the control of the same, a contract entitling the holder of certain notes at a future date to exchange the same for stock at that date, and at no other time, which stock was held by the company contracting, does not vest the title of the stock in said party prior to the exercise of said option. The California Supreme Court (July, 1891), in Cushman v. Root, pushed very far the suppressing policy of sales of stock on margin. The decision gave the most far-reaching effect to sec. 26, art. 4, of the state constitution, which reads as follows: "All contracts for the sale of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void." That was a case of mining shares sold at the stock exchange, but the language of the decision would equally apply to any trading company.

[1] Whitesides v. Hunt, 97 Ind. 191; Gregory v. Wendell, 39 Mich. 337.

[2] Barnard v. Backhaus, 52 Wis. 593; Beveridge v. Hewitt, 8 Bradw. 467; Brand v. Henderson, 107 Ill. 141; Kirkpatrick v. Bonsall, 72 Penn. St. 155. Stock transactions are variously designated by dealers on the stock exchange. In the nomenclature of brokers various terms, which to the uninitiated are unintelligible, have special and important meanings attached to them. For definitions of a "put" see Biglow v. Benedict, 70 N. Y. 202; of a "straddle" see Ex parte Young, 6 Biss. 53; Story v. Salomon, 71 N. Y. 420; Harris v. Turnbridge, 83 N. Y. 92.

[3] Irwin v. Williar, 110 U. S. 499; Ward v. Vosburg, 31 Fed. Rep. 12; Whitesides v. Hunt, 97 Ind. 191; Wall v. Schneider, 17 Reporter, 700; Pixley v. Boynton, 79 Ill. 351. Compare Fareira v. Gabell, 89 Penn. St. 89; Beveridge v. Hewitt, 8 Bradw. 467.

[4] Bartlett v. Smith, 13 Fed. Rep. 263; Hatch v. Douglas, 48 Conn. 116; Wall v. Schneider, 17 Rep. 700; Whitesides v. Hunt, 97 Ind. 131; Union Bank v. Carr, 15 Fed. Rep. 238; Sawyer v. Taggart, 14 Bush. 727.

New York, New Jersey and Pennsylvania, the fact that there is a deposit to cover margins seems to be held conclusive evidence of a wager.[1]

It is not necessary that the seller should actually have the stock in his possession at the time of the sale. The transaction is valid if there be a *bona fide* intention on his part to obtain it in time for future delivery, or if the purchaser intends to insist upon actual delivery within the specified time;[2] and it is immaterial that at the date of the contract the seller has not entered into any arrangement to obtain the stock, but is depending upon purchasing in the market.[3]

§ **493. Executory contracts to sell are valid.**—The element of speculation entering into a sale of stock has no effect to invalidate it. When none of the features of a gambling contract are present parties may make any

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[1] Maxton v. Green, 75 Pa. St. 166; Justh v. Holliday, 11 Wash. L. Rep. 418; Ruchizky v. De Haven, 97 Pa. St. 202; North v. Phillips, 89 Pa. St. 250; Flagg v. Baldwin, 38 N. J. Eq. 219.

[2] Ashton v. Dakin, 7 W. R. 384; Smith v. Bouvier, 70 Pa. St. 325; Thacker v. Hardy, L. R. 4 Q. B. Div. 685; Douglas v. Smith, 38 N. W. Rep. 163; Sawyer v. Taggart, 14 Bush. 727.

[3] Connor v. Robinson, 37 La. Ann. 815; Gilbert v. Gouger, 8 Biss. 214; Third Nat'l Bank v. Harrison, 10 Fed. Rep. 243; Lyon v. Culbertson, 83 Ill. 33; Huss v. Rau, 95 N. Y. 359; Webster v. Sturges, 7 Bradw. 56; Maxton v. Gheen, 75 Pa. St. 166. See also Thacker v. Hardy, L. R. 4 Q. B. D. 685; Dewey on Contr. Fut. Del. 97; Shales v. Seignoret, 1 Ld. Raymond, 440; Noyes v. Spaulding, 27 Vt. 420; Frost v. Clarkson, 7 Cow. 25. The burden of proving that a transaction is a wager contract is upon the party attacking it. This is the general rule as recognized in most of the cases. See Beveridge v. Hewitt, 8 Bradw. 467; Cobb v. Prell, 15 Fed. Rep. 774; Barnard v. Backhaus, 52 Wis. 503; Stebbins v. Leowolf, 3 Bush. 137. These cases hold that option contracts are presumed to be invalid and that proof is required to rebut the presumption. Evidence of the financial responsibility of the parties, Beadles v. McElrath, 3 S. W. Rep. 152; Colderwood v. McCrea, 11 Bradw. 543; Justh v. Holliday, 11 Wash. Rep. 418; Kirkpatrick v. Bonsall, 72 Pa. St. 155; In re Green, 7 Biss. 338; Myers v. Tobias, 16 Atl. Rep. 641; Flagg v. Baldwin, 38 N. J. Eq. 219; North v. Phillips, 89 Pa. St. 250; First Nat. Bank v. Oskaloosa P. Co., 66 Ia. 41, and of similar transactions between the parties is admissible. Irwin v. Williar, 110 U. S. 499; Beveridge v. Hewitt, 8 Bradw. 467; Kirkpatrick v. Bonsall, 72 Pa. St. 155. Contra, Tomblin v. Callen, 28 N. W. Rep. 573.

terms and conditions they see proper as to the time of delivery and payment, subject only to the provisions of the statute of frauds, and the time of delivery may be indefinite, in which case the law will imply a promise to deliver within a reasonable time. "The performance of a contract is no part of the contract. The making of a contract is one thing, but the performance thereof or tender of performance is another and quite different thing. The fact that no time was agreed upon for performance does not change the character of the contract; the contract did not pass any title to the stock, but it was neverthless a valid contract and one which either party can enforce."[1]

But it is held that such contracts are not enforceable against the insolvent estate of a deceased stockholder;[2] also that where no time of performance is fixed, specific performance will not be decreed in equity.[3]

The vendor in an executory contract of sale of stock holds the same in trust for the vendor where the time for delivery is fixed definitely as well as where delivery is to be made within a specified time at the vendor's option.[4] But it is held otherwise when the delivery is at vendor's option.[5]

§ **494. Precautions to be observed with respect to transfers by executors, guardians, etc.**—It may be stated as a general principle that every corporation whose stock is by statute or by-laws adopted in the exercise of stat-

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[1] Benj. on Sales, 428, 498; Bruce v. Smith, 44 Ind. 1. See also Kercheur v. Gettys, 18 S. C. 521; Cheale v. Kenward, 3 De G. & J. 27; Fitzpatrick v. Woodruff, 96 N. Y. 561; Meyer v. Blair, 109 N. Y. 600; 131 U. S. 247; Stewart v. Cauty, 8 M. & W. 160, and Mitchell v. Wedderburn (Md.), 11 Atl. Rep. 760.

[2] Chaffee v. Sprague (R. I.), 13 A. 121.

[3] Diamond, etc., Co. v. Todd (Del.), 14 A. 27.

[4] Currie v. White, 45 N. Y. 822.

[5] Kelly v. Upton, 5 Duer, 336. As to agreements to purchase shares in a corporation to be formed, see Childs v. Smith, 55 Barb. 45, supra, § 306.

utory power, required to be transferred on its books, which permits transfers to be made by an executor, trustee or guardian of stock held by him in a fiduciary capacity for purposes other than his trust of which the corporation has knowledge, will be deemed in equity a constructive trustee of the stock thus wrongfully conveyed, and be compelled to account for its value.[1]

The corporation should, in such cases, refuse to allow a registry of the trustee's transfer until it is satisfied that the trustee has power to make the transfer.[2] The corporation is chargeable with notice of the terms of the trust, and bound to see that the transfer conforms to them, when the instruments containing the trustee's authority are matters of public record or are on file in courts and public offices.[3] And the corporation, having

[1] Perry on Trusts, sec. 242; Stewart v. Firemen's Ins. Co., 53 Md. 564.

[2] Chapman v. City Council (S. C.), 6 S. E. Rep. 158; Bayard v. Farmers' & Mechanics' Bank, 52 Pa. St. 232; Succession of Bonlemet (La.), 3 S. Rep. 401, holding that in a transfer of trust stock the corporation may very properly refuse to allow a registry where the sale is made by the trustee at a price far below its market value. Notice to one board of directors is notice to subsequent boards. Mechanics' Bank of Alex. v. Seaton, 1 Pet. 299.

[3] Bohlen's Estate, 75 Pa. St. 312, holding that a general power of attorney by the other trustee authorizing sales will not protect the corporation in its registry of a transfer signed by one only. See also Marbury v. Ehlen (Md.), 19 A. 648; Coltham v. Eastern Counties Ry. Co., 1 J. & H. 243; Barton v. North, etc. v. Ry. Co., 58 L. T. Rep. 549; Magwood v. R. R. B'k, 5 S. C. 379; Farmers' & M. Bank v. Wayman, 5 Gill. (Md.) 336. Complainants' father left them his estate, but provided that his wife and executrix should be authorized to sell the estate and reinvest at her discretion. Several years after testator's death the executrix's brother, acting under power of attorney from her, pledged stock in defendant corporation belonging to the estate with various banks, and she, as executrix, directed defendant to transfer the stock to the banks. Afterwards defendant allowed it to be retransferred to the executrix individually, and it was pledged under her authority, and lost to the estate. The executrix owned individually a large amount of defendant's stock, which was frequently transferred to and from her. *Held*, that the defendant cannot be held liable for loss of the stock for failure to make inquiry before transferring it, since inquiry could only have disclosed the will and the power of the executrix to sell the stock. Peck v. Providence Gas. Co. (R. I.), 21 A. 543.

Nor in such case, since the executrix owned and made frequent transfers of stock in defendant company in her own right, can defendant be held liable on the ground of negligence in allowing the stock to be transferred by the bank to her individually. Id.

been once informed that there was a will under which the trustees must act, continues chargeable with a knowledge of its terms.[1]

But the corporation is discharged if the *cestui que trust* has been guilty of laches in taking steps to obtain his rights.[2] When, through the negligence or connivance of the corporate agents, a *cestui que trust* has lost his stock, the corporation may be compelled to purchase an equal amount of stock and register it for his benefit.[3]

If the stock is in the name of a trustee for a certain person specified therein, it is notice sufficient to the corporation to whom the stock really belongs, and to induce inquiry as to the legal authority of any other person offering to transfer or dispose of the same, to perform such act.[4] But if holders of the stock hold it in a representative capacity, which implies the right to dispose of it and pass a complete legal title, and there is nothing upon the face of the transaction or otherwise brought to the notice of the agents of the corporation to excite a suspicion that the transfer is being made for a purpose inconsistent with the honest and faithful

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1 Marbury v. Ehlen (Md.), 19 A. 648.

2 Albert v. Sav. Bank of Balt., 1 Md. Ch. 407.

3 Bohlen's Estate, 75 Pa. St. 312.

4 Porter v. Bank of Rutland, 19 Vt. 425; Blandwell v. Stevens, 16 Vt. 179; 4 Johns. Ch. R. 39; Anderson v. Van Allen, 12 Johns. 343; Atkinson v. Atkinson, 8 Allen, 15; Lowry v. Com. Bank, Taney's Cir. Ct. Dec.; Albery v. Sav. B'k, 2 Md. R. 166; Sturtevant v. Jaques, 14 Allen, 523; Simons v. Bank, 5 Rich. Eq. 272; Street v. Laurens, 5 Rich. Eq. 242; Sug. on Vendors, 532. Where certificates for stock stood on the books of a bank in the name of one "in trust for the sole and separate use of an unmarried woman," of full age whose name also appeared in the books of the company and on the face of the certificate, which also stated in addition that "this stock is not transferable except at the Southwestern R. R. Bank in Charleston by the stockholder in person or by attorney," it was held that the bank was liable to the *cestui que trust* in an action for having transferred the stock to a purchaser from the trustee without the knowledge or consent of the *cestui que trust*. Magwood v. R. R. B'k, 5 Rich. (S. C.) 379; Bayard v. Bank, 52 Pa. St. 232.

execution of his trust, the corporation will not be liable in damages or otherwise to the *cestui que trust* for any loss resulting from a conversion or misapplication of the stock by the trustee.[1]

But any suspicious circumstances connected with the transaction, and coming to the knowledge of the agents, will even in that case devolve upon them the duty of making inquiry.[2]

Where by statute executors and administrators are clothed with the full legal title and *jus disponendi* of personalty, a corporation is not liable to the distributees or legatees for fraudulent conversions of shares effected by them by means of transfers on the books to themselves.[3]

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[1] Perry on Trusts, sec. 225 (3d. Ed.); Lewin on Trusts, 417, 7th Ed.; Godefroi on Trusts, 125, 127; Ashton v. Atl. Bank, 85 Mass. 217. A purchaser, however, who has notice of an intention on the part of the trustee to apply the proceeds to his own private uses is not protected. Jaudon v. Nat. City Bank, 8 Blatch. 450; White v. Price, 29 Hun, 394; Shaw v. Spencer, 100 Mass. 382; Simmons v. Southwestern R. R. B'k, 5 Rich. Eq. 279; Walsh v. Stille, 2 Parson's Sel. Cas. in Eq. (Pa.) 17. Power to sell does not authorize a pledge, and a pledge from a trustee is generally chargeable with notice that a pledge by a trustee is made in breach of his trust. Loring v. Brodie, 134 Mass. 453; Merchants' Bank of Canada v. Livingston, 74 N. Y. 223; 130 U. S. 267. Statutory trustees such as guardians and administrators are held to the same accountability with respect to investments of the fund in stock as where the trust is created in wills, trust deeds and similar instruments.

[2] As where the testator's bank stock was sought to be transferred by his executrix six years after the period limited by statute for winding up the estate. Peck v. B'k (R. I.), 19 A. 369. See Blaisdell v. Bohr, 77 Ga. 381; holding that the corporation, though guilty of negligence, will not be held liable where equity would compel complainant to make the transfer.

Where a certificate merely contains the addition of the word "trustee" after the name of the holder, without the facts coming to the knowledge of the agents of the corporation, nothing more appearing on the books of the corporation or on the face of the certificate to indicate the trust and its nature, the *cestui que trust*, who having full capacity to act has clothed his agent or trustee with the legal title one of the highest indicia of ownership must bear the consequences resulting from the acts of the agent. Standing alone the designation of one holding the legal title "trustee" raises no implication that he has not authority to sell or hypothecate the stock in the usual course of business. Brewster v. Sime, 42 Cal. 139. See also Salisbury Mills v. Townsend, 109 Mass. 115; Stone v. Hackett, 12 Gray, 227; Cohen v. Grayson, 4 Md. Ch. 357; Farmers', etc., Bank v. Wyman, 5 Gill. 336.

[3] Albert v. Mayor, etc., 2 Md. 159. See also McLeod v. Drummond, 17 Vesey,

§ 495. Transfers to guardians, executors, trustees, etc.—Having considered the duties of the corporation and the vigilance required of it to prevent transfers by persons owning its stock, in a fiduciary capacity, it is in order next to consider the rights and powers of such persons to invest the trust fund in corporate stocks. As a general rule, except where it is done in carrying out the provisions of wills or other instruments, creating the trust, or where such power is conferred upon administrators by statute under the direction of probate courts, no power to make such investments exists. Such was the rule at common law in England.[1]

In this country this rule has been generally adhered to, though it has been very much modified by statutes in many states. A trustee investing in stocks and other securities of private corporations without clear authority conferred either by statute or in the trust instrument, becomes personally liable for any loss to the estate resulting therefrom.[2]

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152 and cases there collected, and Field v. Schiefflin, 7 Johns. Ch. Rep. 150; Loring v. Salisbury Mills Co., 125 Mass. 138; Atkinson v. Atkinson, 8 Allen, 15.

[1] Trafford v. Boehm, 3 Atk. 440; Lewin on Trusts, 281 (7th Ed. 1879).

[2] Adair v. Brimmer, 74 N. Y. 539, 551; aff'g, 50 Barb. 453; King v. Talbot, 40 N. Y. 76; Mills v. Hoffman, 26 Hun, 594; App. of Porter, 12 Atl. Rep. 513; In re Warde, 2 Johns. & H. 191; Waite v. Whorwood, 2 Atkyns, 159; Gray v. Fox, 1 N. J. Eq. Rep. 259; Kimball v. Reding, 31 N. H. 352; Ihmsen's App., 43 Pa. St. 431; Worrell's App. 9 Pa. St. 508; Ackerman v. Emott, 4 Barb. 626; Nyce's App., 5 Watts & Searg. 254; Rush's Estate, 12 Pa. St. 375; Barton's Estate, 1 Pars. 24; Berry v. Yates, 24 Barb. 210; Brown v. Campbell, Hopkins Ch. (2d. Ed.) 265; Norris v. Wallace, 3 Pa. St. 319; Hemphills' App., 18 Pa. St. 303; Pray's App., 34 Pa. St. 100; Halsted v. Meeker's Exrs., 18 N. J. Eq. Rep. 136; Ward v. Kitchen, 30 N. J. Eq. Rep. 31; French v. Currier, 47 N. H. 88, 99. In a few states the power to make such investments has been recognized. Smyth v. Burns, 25 Miss. 422; 114 U. S. 218; Washington v. Emory, 4 Jones' Eq. (N. C.) 32; Boggs v. Badger, 4 Rich. Eq. (S. C.) 408; Gray v. Lynch, 8 Gill. (Md.) 403; Lamar v. Micou, 112 U. S. 452. Compare Harvard College v. Amory, 26 Mass. 446; Lovell v. Minot, 37 Mass. 116. In App. of Pa. (Pa.), 15 A. 719, it was held that a trustee expressly authorized to invest in stock of a particular corporation may take it in his individual name.

This principle applies as well to the sale of stock held under an express trust, and to investment of the proceeds in other stock or property as to the making of an original investment.[1] But a court would seldom hold a trustee personally liable for changing the investment where it was done in good faith, and was at the time clearly for the benefit of the *cestui que trust.*[2] It might become his duty to sell the stock if it is depreciating in value;[3] but he would not be liable for failure to sell, if not guilty of negligence.[4]

§ 496. Married women, infants, etc., as purchasers of stock.—That a married woman has no more capacity to purchase than to subscribe for stock in a corporation at common law is too well established to require discussion. Statutes, however, have greatly modified, and, in many states, entirely reversed the common law rule on this subject. The *lex domicilii* usually determines her right, though sometimes the charter or law of the state where the corporation was created must also be consulted.[5]

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[1] Bohlens' Estate, 75 Pa. St. 312; Peckham v. Newton, 4 Atl. Rep. 758 (R. I.); Earl Powley v. Herbert, 1 Ves. 297; and Murray v. Feinour, 2 Md. Ch. 418.

[2] See Duncan v. Jaudan, 15 Wall. 171; Washington v. Emory, 4 Jones' Eq. 32.

[3] Ward v. Kitchen, 30 N. Y. Eq. 31; Parker v. Glover, 9 Atl. Rep. 217; Bowker v. Pierce, 130 Mass. 262; App. of Stewart, 6 Atl. Rep. 321.

[4] Murray v. Feinour, 2 Md. Ch. 418. In case of sale of stock held in trust in breach of the trust the *cestui que trust* has his election to ratify the sale and require an accounting or to compel a restoration in kind. Pocock v. Reddington, 5 Ves. 800; Hart v. Ten Eyck, 2 Johns. Ch., 62, 117; Harrison v. Harrison, 2 Atkyns, 121; Long v. Stewart, 5 Ves. 809; Bostock v. Blakeney, 2 Browns' Ch. R. 653. See also Pinlett v. Wright, 2 Hare, 120. Where the first course is pursued the measure of liability is the market value received at the time of bringing suit, together with interest and any dividends declared after the breach of trust. Snyder's Admrs. v. McComb's Exrs., 39 F. 292. And it was held that the beneficiary may elect to have an accounting for the market value at the time of the conversion instead of at the beginning of suit. McKim v. Hubbard (Mass.), 8 N. E. 152.

[5] See Hill v. Pine River Bank, 45 N. H. 300. In Vermont a married woman

Registry is necessary to a reduction of the wife's stock to the possession of the husband.[1] The mere collection of dividends on the stock is not sufficient.[2] But after a regular transfer by a married woman having power to make it, the corporation cannot cancel the registry.[3]

A purchase of stock by an infant is voidable but not void.[4] He may disaffirm it either during minority,[5] or make the infancy available as a defence.[6] If not disaffirmed during infancy, the contract must be avoided by some act of repudiation within a reasonable time after attaining majority.[7] A transfer of the certificate does not aid the invalidity of a purchase of shares by an infant.[8]

§ **497. Legality and genuineness warranted by corporation.**—The form in which stock certificates are issued is such as to invite the confidence of business men in all the large cities, and to make them the basis for large commercial transactions in the open market, the same as other securities. Though neither in form nor in legal acceptation negotiable paper, they approximate

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is competent to become a stockholder in a corporation and to contract to charge her separate property with the payment of any liability which is implied from entering into that relation. Witters v. Sowles, 38 F. 700. In California it is held that the husband has no right to sell stock standing in his wife's name. Dow v. Gould, 31 Cal. 629. See also Leitch v. Wells, 48 N. Y. 585; Stanwood v. Stanwood, 17 Mass. 57; Wall v. Tomlinson, 16 Ves. 413; nor is her stock liable for his debts. Cochrane v. Chambers, Ambl. 79 n.; Platt v. Hawkins, 43 Conn. 139; Compare Contrs. Stamford B'k v. Ferris, 17 Conn. 259.

1 Slaymaker v. Bank of Gettysburgh, 10 Pa. St. 373. See Arnold v. Ruggles, 1 R. I. 165; Wildman v. Wildman, 9 Ves. 174.

2 Burr v. Sherwood, 3 Bradf. (N. Y.) 85.

3 Ward v. S. E. Ry. Co., 2 El. & El. 812.

4 Lumsden's Case, L. R. 4 Ch. 31.

5 Newry v. Enniskillen R. Co. v. Coombe, 3 Ex. 565.

6 St. Louis & S. C & M. Co. v. S. C. & M. Co., 116 Ill. 170; 5 N. E. 370.

7 Birkenhead L., etc., J. R. Co. v. Pilcher, 5 Ex. 24.

8 Dublin & Wicklow R. Co. v. Black, 8 Ex. 181.

9 Smith v. Baker, 42 Hun, 505.

it so nearly as to answer the same practical purpose. By the usual form in which it is issued, the corporation under its seal tells whoever subscribes for it, or happens to be the purchaser of it, that he is entitled to so much stock, which can be transferred on the books of the corporation in person or by attorney, when the certificates are surrendered. It usually contains the further notification and assurance that the corporation will not transfer the stock to any one not in possession of the certificate.[1] Since the agents of the corporation have the best means of knowing the amount of stock it is authorized to issue, it is bound to make good to the purchaser from them any loss resulting from investments in good faith in certificates issued in excess of legal authority.[2]

It is not necessary in order that the purchaser may rely upon the genuineness of the vendor's title to the certificate, and the legality of its issue, that it should state upon its face that the stock is transferable "upon the demand of the vendor of this certificate" or any equivalent words. The law implies that.[3]

§ 498. **Rights between the immediate parties to a transfer.**—When shares of stock are transferred, there is a complete substitution of one person for another in all

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[1] Bank v. Lanier, 11 Wall, 377; Johnson v. Laflin, 103 U. S. 800. It is the duty of a corporation which has issued a certificate for shares transferable on its books not to permit a transfer to be executed upon the books or to issue a new certificate until the outstanding certificate has been surrendered. Strange v. H. & T. C. R. Co., 53 Tex. 162; Bank v. Lanier, 11 Wall. 369; Bridgeport B'k v. N. Y., etc., R. Co., 30 Conn. 231, 270; Factors', etc., Ins. Co. v. Marine Dry Docks, etc., Co., 31 La. Ann. 149; N. Y., etc., R. R. Co. v. Schuyler, 34 N. Y. 36; Lee v. Citizens' Nat. Bank, 2 Cin. 298; Smith v. American Coal Co., 7 Lansing, 317; Cleveland, etc., R. R. Co. v. Tappett, 32 A. L. J. 117. But see Nat. B'k v. Lake Shore, etc., Ry. Co., 21 O. St. 221.

[2] N. Y., etc., R. R. Co. v. Schuyler, 34 N. Y. 30; Holbrook v. N. J. Zinc Co., 57 N. Y. 618. But not to recognize the legal validity of such fraudulent certificates see Infra, §

[3] Re Factors', etc., Co., 31 La. Ann. 149.

rights and duties attaching to the interest forming the subject of their contract.[1] An entry on the books is not necessary to vest the vendee with all the title which the vendor had. By the sale and assignment the vendor divests himself of not only the equitable but the legal title, and estops himself from claiming any further title to the stock as against the transferee and subsequent purchasers without notice of any equities which may subsist between the parties to such transfer.[2] Such transfer when freed from fraud binds not

[1] There must be all the essentials of a sale or the transfer will be ineffectual to vest the alleged transferee with the rights and relieve the prior holder from the liabilities of membership. Powell v. Williamette Val. R. Co., 15 Or. 393; 15 P. 663. The prospectus of an apartment house corporation stated that the owner of a certain amount of stock would be entitled to a virtually perpetual lease of an apartment. C. subscribed for 70 shares, sufficient to entitle him to a certain apartment, which was assigned to him; and by agreement the certificate of stock was issued to V. At a meeting of stockholders the plan of the building was changed, and the amount of capital stock was increased, the additional stock being distributed among the stockholders without anything being paid therefor. Before such distribution the stockholders resolved that an annual rent should be charged stockholders, and leases should be executed by them on that basis, V. voting therefor as holder of the 70 shares, which stood in his name, though he had previously sold them to plaintiff. Thereafter plaintiff surrendered the certificate issued to V., and received a certificate for the original 70 shares and 67 shares of the increased stock. *Held*, that plaintiff was not entitled, by virtue of the original subscription, to the apartment without executing a lease pursuant to the resolutions. He was bound by the change of plan and the additional conditions, such change having been assented to by the then holder of his stock, and ratified by plaintiff by his acceptance of the additional stock. Distinguishing Driscoll v. Manufacturing Co., 59 N. Y. 96. Compton v. The Chelsea, 13 N. Y. S. 722.

Where by the provisions of a statute relating to the incorporation of co-operative savings associations a member had obtained a loan from the association by sale to it of his shares at a discount, it was held that such shares were thereby liquidated and could not afterwards be sold or transferred. Michigan Bldg. & Sav. Ass'n v. McDevitt, 77 Mich. 1; 43 N. W. 760.

The holder of bonds issued by a town in payment of its subscription to railroad stock, which bonds had been held void, sued the town and the railroad company, and procured a decree, the town not objecting, that the bonds should be surrendered and canceled, and the stock, in payment of which they were issued, transferred by the town to him. *Held*, that he is in the same attitude as if the town had voluntarily transferred the stock to him, and the railroad company cannot object thereto. Illinois G. T. Ry. Co. v. Wade, 11 S. Ct. 709.

[2] Beckwith v. Burroughs, 13 R. I. 294; Conant v. Reed, 1 O. St. 298; Scott

only himself but his heirs and personal representatives, and assigns in bankruptcy or insolvency.[1]

This principle applies notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration.[2] Such a provision has no more effect upon the rights of the parties than the provision in statutes requiring registration of transfers of real estate. The title passes as between the parties, though the deed is unrecorded.[3]

A registry is important in order to furnish the transferee the best evidence of his title and to enable him to enjoy the full benefits of his purchase. He is not entitled to vote or receive dividends[5] until he has given notice to the corporation and had his name substituted

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v. Pequonnock B'k (U. S. C. Ct.), 15 Rep. 137; Balt. City P. Ry. Co. v. Sewall, 35 Md. 238; Fitchburg Sav. B'k v. Torrey, 134 Mass. 239; U. S. v. Vaughan, 3 Cinn. (Pa.) 394; Duke v. Cahawba Nav. Co., 10 Ala. 82; Chouteau Spg. Co. v. Harris, 20 Mo. 382; America v. McNeil, 10 Bush, 54; Carroll v. Mullanphy Sav. B'k, 8 Mo. App. 249; Gilbert v. Manchester Iron Mfg. Co., 11 Wend. 627; Farmers' & M. Bank v. Wasson, 48 Ia. 336; Broadway B'k v. McElrath, 13 N. J. Eq. 24; Smith v. Crescent City, etc., Co., 30 La. Ann. 1378; Cushman v. Thayer Mfg. Co., 76 N. Y. 365; People's Bank v. Gridley, 9 Ill. 457; White v. Salisbury, 33 Mo. 150; Crawford v. Provincial Ins. Co., 8 Upper Can. 9 P. 263.

[1] Dickinson v. Cent. Nat. B'k, 129 Mass. 279; Ex parte Dobson, 2 Mont. D. & D. 685; Morris v. Cannon, 8 Jur. N. S. 653; Sibley v. Quinsigamond Nat. B'k, 133 Mass. 515; no informalities or irregularities in the transfer can be set up by the transferrer or his privates to defeat the title of his transferee. Sheffield A. & M. Ry. Co. v. Woodcock, 7 M. & W. 574; Home Stock Ins. Co. v. Sherwood, 72 Mo. 461; Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. 576; Cheltenham & G. W. N. Ry. Co. v. Daniels, 2 Q. B. 281; Maguire's Case 3 De G. & S. 31; Chew v. B'k of Balt., 14 Md. 299.

[2] Johnson v. Laflin, 103 U. S. 800; s. c. 5 Dill. 65.

[3] Noyes v. Spaulding, 27 Vt. 420, the court saying: "The object of having the transfer recorded on the books of the corporation is notice, and that is the only object. For that reason the transfer, though unrecorded, is good against the party and all those who have notice in fact of the transfer." See also Bank of Utica v. Smalley, 2 Cowen, 770; U. S. v. Cutts, 1 Sumn. 133; First Nat. B'k, v. Gifford, 47 Ia. 575; Johnson v. Underhill, 52 N. Y. 203; Baldwin v. Canfield, 26 Minn. 43.

[4] Nicollet Nat. B'k v. City B'k, 38 Minn. 85, 35 N. W. 577; Herdegen v. Cotzhausen, 70 Wis. 589; 36 N. 385; Thurber v. Crump (Ky.), 6 S. W. 145; Poole v. W. P. B., etc., Assn., 30 F. 513; Gould v. Head, 41 F. 240.

[5] Supra, §§ 465, 476.

for that of the original owner as a member. And until that is done, the original owner remains liable to the corporation to pay all assessments whether made before or after such sale and assignment.[1]

But a failure to do this does not alter the relations between the immediate parties to the transfer. The rights and duties between them are not added to or diminished by failure to have the transfer made. While the corporation is not bound by it, and may continue to exact dues from and pay dividends to the vendor, the latter may, by bill in equity, compel the vendor to do all things necessary to a complete substitution and transfer. And if the vendor has incurred liability to the corporation and its creditors since the sale, he may have the vendee compelled to indemnify him to that extent.[2]

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[1] Bell's App., 115 Pa. 288; 8 A. 177; Hamilton v. Glenn (Va.), 9 S. E. 129; and this liability is not altered by the fact that the assignor held the stock as trustee for another whose name does not appear on the books of the corporation. Borland v. Haven, 37 F. 394. See Treadway v. Johnson, 33 Mo. App. 122. Where an executor, without consideration, transfers bank stock in trust for his own benefit, and to enable the transferee to become a director of the bank, the title, for the purpose of assessment, remains with the executor. Witters v. Sowles, 32 F. 130. The Ala. Stat. makes both assignor and assignee liable for assessments due at the time of transfer. Morris v. Glenn, 87 Ala. 628; 7 So. 90.

[2] Kellogg v. Stockwell, 75 Ill. 68; Witters v. Sowles, 32 F. 762; Herdegen v. Cotzhausen, 70 Wis. 589; 36 N. W. 385; Wynne v. Price, 3 De G. & Sm. 310; Cheale v. Kenward, 3 De. G. & J. 27; Crescent City, etc., Co. v. Deblieux, 40 La. Ann. 155; 3 So. 726. See also Callanan v. Windsor, 78 Ia. 193; 42 N. W. 652. Where after assignment and delivery of stock as collateral the pledgee neglected for seven years to have the proper transfer made on the company's books, and in the meantime the shares were sold under execution against the vendor, the transfer made by the sheriff making the sale to the purchaser was held to extinguish the titles of both pledgor and pledgee. Noble v. Turner, 69 Md. 519. The vendor is not bound by an agreement between the corporation and the vendor to the effect that the latter will give existing stockholders preference in the sale of the stock. Especially is this true where the vendee is not shown to have had notice of such agreement. Gould v. Head, 41 F. 240. The liability to indemnify previous holders for calls paid by them is confined to the holders of the shares at the time of the call being made by the company. Brinkley v. Hambelton, 67 Md. 169; 8 A. 904.

After a contract for the sale of certain shares in the stock of a corporation

This right of indemnity may be enforced either at law by reason of the implied contract,[1] or in equity where the relation of trustee and *cestui que trust* exists between the parties.[2]

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but before the time appointed for receiving payment and making delivery, a dividend was declared as to which there was no express stipulation in the contract. It was held that though the purchaser, if he has accepted the stock and paid for it, would have been entitled to the dividend, as between the immediate parties to the transfer, yet he had no right to decline acceptance and payment because the seller claimed the dividend as his own, and refused to give an order for its payment to him (the purchaser). The latter, having failed without just cause to comply with his contract, lost his hold both upon the stock and the dividend. Phinizy v. Murray, 83 Ga. 747; 6 L. R. An. 426. See also Sargent v. Franklin Ins. Co., 8 Pick. 90; Ross v. S. W. R. Co., 53 Ga. 515; Cent. R. & B'kg Co. v. Papot, 59 Ga. 342; Bright v. Lord, 51 Ind. 272; Black v. Hemersham, L. R. 4 Exch. Div. 34; Harris v. Stevens, 7 N. H. 454. It is the right and duty of the purchaser in such case to accept the tender of the stock and proxies and then sue the seller, if necessary, to recover the dividend. Miller v. Mariner's Ch., 7 Me. 51; Hamilton v. McPherson, 28 N. Y. 72; Conant v. Seneca, etc., B'k, 1 Ohio St. 298. A purchaser of shares takes them subject to a lawful agreement previously entered into among the stockholders by which new obligations are imposed upon them, and can only demand a certificate in accordance with such agreement. Campbell v. Zylomite Co., 55 N. Y. Sup. Ct. 562; 3 N. Y. St. 822.

An owner of stock on which a dividend had been declared but not paid authorized an agent to sell the stock, expressly reserving the right to the dividends. The agent agreed with the purchaser that the dividend should go with the stock. *Held*, that the purchaser had no right to presume that the agent, because the possessor of the stock, was authorized to sell the dividend, which formed no part and did not pass as an incident to it, and as to that dealt with the agent at his peril, and that the owner of the stock was not bound by his representations, and that the retention of the proceeds of the sale without knowledge of the unauthorized representations did not amount to a ratification of them. Wheeler v. Northwestern Sleigh Co., 39 Fed. Rep. 347. See also Owings v. Hull, 9 Pet. 629; Berrueke v. Ins. Co., 105 U. S. 360; Bloomfield v. B'k, 121 M. S. 135; Rolling Mill v. Ry. Co., 5 Fed. Rep. 852; McClelland v. Whiteley, 15 Fed. Rep. 322; Dickinson v. Conway, 12 Allen, 491; Bell v. Cunningham, 3 Pet. 69, 81; Hastings v. Proprietors, 18 Me. 436; Bryant v. Moore, 26 Me. 87; Thatcher v. Pray, 113 Mass. 291; Nav. Co. v. Dandridge, 8 Gill. & J. 248; Smith v. Tracy, 36 N. Y. 79; Baldwin v. Burrough, 47 N. Y. 199; Smith v. Kidd, 68 N. Y. 130; Reynolds v. Ferree, 86 Ill. 576; Roberts v. Rumley, 58 Ia. 301; Bohart v. Oberne 36 Kan. 284; Ins. Co. v. Iron Co., 21 Wis. 458, 464.

[1] Walker v. Bartlett, 18 C. B. 845, overruling Humble v. Langston, 7 M. & W. 517; Chapman v. Shepherd, L. R. 2 C. P. 228; Grissell v. Bristowe, L. R. 3 C. P. 112; Bowring v. Shepherd, L. R. 6 Q. B. 309; Kellock v. Enthoven, L. R. 9 Q. B. 241, affirming L. R. 8 Q. B. 458; Davis v. Haycock, L. R. 4 Exch. 373; Brigham v. Mead, 10 Allen, 245.

[2] Johnson v. Underhill, 52 N. Y. 203, 214; Wynne v. Price, 3 De G. & Sm.

The vendee is entitled to any dividends which may be declared pending a completion of the transfer, and if dividends are paid in the meantime to the vendor, he may have an accounting in equity or sue at law for money had and received to his use.[1] The statute of frauds is no defence to an action by the vendor on a verbal agreement made at the time of the sale of shares that the purchaser shall assume the liabilities and receive the dividends past and future.[2]

§ 499. **Measure of damages between vendor and vendee of stock.**—In the absence of evidence of actual sales, the market value is presumptively the par value; and the burden of proof is on the defendant that the market value is less than the par value.[3] But other evidence than actual sales is admissible where no sales can be shown, such, for instance, as the dividend earning power and special value.[4] In the absence of better evidence the market value of all the property of the corporation may be shown with a view to arriving at

310; Kellogg v. Stockwell, 75 Ill. 68; Cheale v. Kenward, 3 De G. & J. 27; Hawkins v. Maltby, L. R. 4 Ch. 200; Morris v. Cannan, 4 De G. F. & J. 581; Evans v. Wood, L. R. 5 Eq. 9; Shaw v. Fisher, 5 De G. M. & G. 596; 2 De. G. & Sm. 11; Cruse v. Paine, L. R. 6 Eq. 641; 4 Ch. 441; James v. May, L. R. 6 H. L. 328; Butler v. Cumpston, L. R. 7 Eq. 16.

1 See Gilbert v. Manchester Iron, etc., Co., 11. Wend. 627; Fitchburg Sav. B'k v. Torrey, 134 Mass. 239; Sargent v. Franklin Ins. Co., 8 Pick. 90; Quiner v. Marblehead, etc., Ins. Co., 10 Mass. 476; Planters', etc., Mut. Ins. Co. v. Selma Sav. B'k, 63 Ala. 585; U. S. v. Cutts, 1 Sumner, 133; Ex parte Dobson 2 Mont. D. & D. 685; Stebbins v. Phœnix Fire Ins. Co., 3 Paige, 350; Brigham v. Mead, 10 Allen, 245; Nesmith v. Wash. B'k, 6 Pick. 324; Sabin v. B'k of Woodstock, 21 Vt. 353; Baltimore, etc., Ry. Co. v. Sewall, 35 Md. 252; Conant v. Reed, 1 Ohio St. 298; Duke v. Cahawba Nav. Co., 10 Ala. 82; St. Louis, etc., Ins. Co. v. Goodfellow, 9 Mo. 149; Tuttle v. Walton, 1 Ga. 43; McCready v. Rumsey, 6 Duer. 574. See Johnson v. Laflin, 5 Dill. 79, and cases cited.

2 Bailey v. Shroyer (Pa.), 1 A. 717. The reason assigned for so holding was that the promise was not "to pay the debt of another, but to discharge an oblition assumed by virtue of his purchase of the stock.

3 App. of Harris (Pa.), 12 A. 743.

4 Freon v. Carriage Co., 42 O. St. 30, 38. See also Shaw v. Fisher, 2 De G. & Sm. 11; s. c. 5 De G. M. & G. 596.

the proportionate value of the shares in controversy.[1] The published market rates in the newspapers may be read in evidence.[2]

§ **500. Remedies for breach of contracts for future delivery.**—The vendee may, where the time of performance and terms of sale are fully set forth, sue the vendor in equity for specific performance where the shares have no ascertainable market value, and the latter is still in a position to perform the contract;[3] in other cases, his remedy is at law in an action for damages.[4] When the sale is conditional, upon failure to perform the condition, the vendor may proceed against the vendee as a trustee of the stock and compel a re-transfer, making the corporation a party defendant.[5] The market value may be fixed by evidence of the price at which the stock is sold in the market at a given time. In case no sales can be shown to have taken place at or about the time in question, evidence of sales at other approximate periods is admissible.[6] Of course the price agreed upon may be recovered when the action is by vendor against vendee for refusal to accept and pay for stock.[7]

The remedy by action for specific performance in these as in other cases depends principally upon the absence of an adequate remedy at law, generally because of the impossibility of fixing a measure of damages. This often happens in the case of contracts to

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[1] Hitchcock v. McElreath, 72 Cal. 565; 14 P. 305. See also McGuffey v. Humes, 1 Pickle (Tenn.), 26; 1 S. W. 506.

[2] Brinkley v. Hambleton, 8 Atl. Rep. 904; Lessassier v. Kennedy, 36 La. Ann. 539.

[3] Poole v. Middleton, 29 Beav. 646; Beckitt v. Billsbrough, 8 Hare, 188; Turner v. May, 32 L. T. N. S. 56.

[4] Alford v. Wilson, 20 F. 96. See also Jones v. Kent, 80 N. Y. 585.

[5] Johnson v. Kirby, 65 Cal. 482; 4 P. 458.

[6] Douglas v. Merceles, 25 N. J. Eq. 144; Stewart v. Cauty, 8 Mees, & W. 160; Seymour v. Ives, 46 Conn. 109; Sturges v. Keith, 57 Ill. 451; Texas, etc., Ry. v. Gentry, 69 Tex. 625; 8 S. W. 98.

[7] Mabley v. Morgan (Pa.), 6 A. 694.

sell shares in mining companies;[1] though it applies under similar circumstances to corporations formed for other purposes.[2]

Courts will exercise a very liberal discretion in granting and refusing relief in such cases.[3] No decree should be entered until all parties in interest are before the court.[4]

§ 501. **Certificate carries notice of nature of title.**—But the purchaser takes the shares in the condition in which the certificate shows them to be held by the vendor.[5] If it shows them to be only partly paid up, the purchaser and not the seller is liable for the amount remaining unpaid; even though a call for the unpaid balance has been issued before the sale and the vendor is entitled to indemnity for the payment of calls made before and paid after the sale in the absence of an understanding to the contrary.

But the position of the corporation in respect to unpaid calls, differs from that of the immediate parties to a transfer. After a call has been made the corporation has a cause of action against the shareholder at the time of making it; and this cause of action cannot be extinguished except by its consent.[6]

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1 Frue v. Houghton, 6 Col. 318; Treasurer v. Com. Coal. Min. Co., 23 Cal. 390.

2 Chater v. S. F. S. R. Co., 19 Cal. 200; White v. Schuyler, 1 Abb. Pr. N. S. 300. App. of Goodwin, etc., Co., 117 Pa. St. 514; 12 A. 736; Price v. Minot, 107 Mass. 49. In this case a party had contracted to do a certain amount of work upon the promise of a director and stockholder to pay therefor in a certain number of shares of stock of the corporation. Having been discharged without cause before completion of the work specific performance was decreed.

3 Relief was refused in Jones v. Newhall, 115 Mass. 244; Noyes v. Marsh, 123 Mass. 286; Cushman v. Thayer Mfg. Co., 76 N. Y. 365; Eckstein v. Downing, 9 Atl. Rep. 626.

4 O'Connor v. Irvine, 74 Cal. 435; 16 P. 236.

5 West Nashv. P. M. Co. v. Sav. B'k, 2 Pickle (Tenn.), 252; 6 S. W. 340; Peo. Brew. Co. v. Borbinger, 40 La. Ann. 277; 4 So. 82; State v. Cotton Oil Trust, 40 La. Ann. 8; 3 So. 409.

6 Schenectady Plank Road Co. v. Thatcher, 11 N. Y. 102; Kellock v. Entho-

But as between the immediate parties the transferrer has recourse against his immediate transferee for such calls and assessments as he has been compelled to pay pending registration;[1] but not against a second transferee who took without notice of his right in the meantime.[2] There is no privity between a transferrer and a second transferee nor between a first and a third transferee upon which to base an action for reimbursement for calls and assessment. Each must look to his immediate transferee.[3] The company has no right to make calls on the transferrer after notice to it of the transfer.[4] And after registry of the transfer he is not estopped from denying such liability by the payment of a previous call.[5]

And it may waive its right to look to the transferrer by accepting the transferee as a stockholder and paying dividends to him before registry of the transfer, in which case the transferee becomes solely liable.[6] The same rule applies where he is accepted and acts as a

ven, L. R. 9 Q. B. 241; S. C., L. R. 8 Q. B. 458; Grissell v. Bristowe, L. R. 3 C. P. 112; Kellogg v. Stockwell, 75 Ill. 68; Lord v. Hutzler, 3 Atl. Rep. 891; Brigham v. Mead, 10 Allen, 245; Davis v. Haycock, L. R. 4 Exch. 373; Johnson v. Underhill, 52 N. Y. 203; Walker v. Bartlett, 18 C. B. 845; overruling Humble v. Langston, 7 Mee. & W. 517; Bowring v. Shepherd, L. R. 6 Q. B. 309; Thompson's Liability of Stockholders, sec. 217.

[1] Castellan v. Hobson, L. R. 10 Eq. Cas. 47.

[2] Shaw v. Fisher, 2 De G. & Sm. 11; S. C., 5 De G. M. & G. 596. As to the rights between second and third transferees as between themselves see Brinkly v. Hambleton, 8 Atl. Rep. 994; Lessassier v. Kennedy, 36 La. Ann. 539.

[3] Nicholls v. Eaton, 23 L. T. (N. S.) 689; Kellock v. Enthoven, L. R. 9 Q. B. 241. Compare Hawkins v. Maltby L. R. 3 Ch. 188.

[4] Chouteau Springs Co. v. Harris, 20 Mo. 382. See also Haynes v. Palmer, 13 La. Ann. 240; McKenzie v. Kittridge, 24 Upper Can. C. P. 1; Miller v. Great Republic Ins. Co., 50 Mo. 55; Weston's Case, L. R. 4 Chan. 20; Allen v. Montgomery R. R. Co., 11 Ala. 437, 451.

[5] Prov. Ins. Co. v. Shaw, 19 N. C. (Q. B.) 533.

[6] Murray v. Bush, L. R. 6 H. L. 37; Isham v. Buckingham, 49 N. Y. 216; Upham v. Burnham, 3 Biss. 431; S. C. Id. 520; Cutting v. Dameral, 88 N. Y. 410; Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120. Compare Shipman's Case, L. R. 5 Eq. 219.

director.[1] The rights between the parties are not affected by the nature of the consideration: or the absence of a consideration:[2] nor by the fact that no certificate has been issued for the shares;[3] unless the

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[1] Weinman v. Wilkinsburg, etc., Ry Co., 118 Pa. St. 192; 12 Atl. Rep. 288; Bernards' Case, 5 De G. & Sm. 283. See also Sheffield, etc., v. Woodcock, 7 M. & W. 574.

Where a transfer had been made by a father to his son, the latter not receiving dividends nor doing any acts as proprietor, but enjoying free passage upon the boats of the company, it was held that the son was liable with respect to his shares so held. Maguire's Case, 3 De G. & Sm. 31. A receiver cannot require the company to put a transferee's name on the list of contributors on the ground of undue delay of the company in registering the transfer. It is a wrong done to the transferee and to him alone. Sichells' Case, L. R. 3 Ch. 119. See also Marlborough Mfg. Co. v. Smith, 2 Conn. 579, where it was held that a mere entry on the corporate books that a transfer has been made is insufficient. It is not necessary that mere forms be observed by transferee of shares in order to render him liable, these being required merely for the benefit of the company. Burnes v. Pennell, 2 H. of L. Cas. 497; but the court refused to hold one liable as a stockholder who had transferred his shares seven years previously though not by a proper method and whose name had not appeared on the books at all. Taylor v. Hughes, 2 Jones & Lat. (Ir. Ch.) 24. In Dane v. Young, 61 Me. 160, it was held that a failure to have the transfer properly witnessed on the registry invalidated it. In Simmons v. Hill, 96 Mo. 679; 10 S. W. Rep. 61, it was held that a person who had bought stock at an execution sale which had been previously pledged for its full value to others upon transfer to them was not liable for calls, although such pledgees had transferred it to him without his knowledge. It was held that a vendee of stock entitled to it only upon payment was not liable for the subscription price until such transfer had been made or until he had paid for it, his name never having appeared on the books. Cormac v. Western, etc., Co., 77 Ia. 32; 41 N. W. Rep. 480. The transferrer remains liable where the consent of the board of directors is necessary to the transfer and no such consent has been obtained. Bosanquet v. Shortridge, 4 Ex. 699. See also Taylor v. Hughes, 2 Jo. & La. (Irish). Where a deed of settlement required among other things that a transferee should covenant by deed to abide the rules of the company it was held that a director, failing to comply with that requirement was a shareholder as to the shares held by him. The reason given was, that he had been recognized as a shareholder at a meeting of shareholders and had been elected and acted as a director. Bush, L. R. 6 H. of L. 37; aff'g L. R. 6 Ch. 246. See also First Nat. B'k, etc., v. Gifford, 47 Iowa, 575, 583; Brigham v. Mead, 10 Allen, 245; Straffon's Executor's Case, 1 De G. M. & G. 576. Compare Keenes' Ex'rs Case, 3 De G. M. & G. 272; Mayhews' Case, 5 De G. M. & G. 837.

[2] In re European B'k, Master's Case, 41 L. J. Chan. 501.

[3] Brigham v. Mead, 10 Allen, 245; First Nat. B'k v. Gifford, 47 Ia. 575, 583; Burke v. Smith, 16 Wall. 390; Isham v. Buckingham, 49 N. Y. 216.

rights and liabilities of the parties are otherwise determined by statute.[1]

§ 502. Where the transfer is conditional.—A transfer of stock as of other choses in action evidenced by writing, may be executed as collateral security, or subject to any condition the parties may agree upon. Such transfers stand on the same footing as respects the rights of the immediate parties as in ordinary sales. Their rights in the matter of liability to creditors of the corporation and in matters of dividends are the same.[2]

The same law governs with respect to notice, and the relative equities and rights of the parties to the transfer, both actual and constructive, as in other transfers, and the pledgee has the same right to require transfer on the books of the corporation as other transferees.[3] And the pledgor stands in the same attitude in that respect as other transferrers.[4] The corporation owes the same duty, and is liable in like manner for refusing to make the proper entry in its books. The corporation has no power to limit or to annex conditions to the right of the owner to pledge his stock, as by requiring

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[1] See Infra, § 790, 791.

[2] Shipman v. Ætna Ins. Co., 29 Conn. 245; State Ins. Co. v. Sax, 2 Tenn. Ch. 507; Oxford Turnp. Co. v. Burns, 6 Conn. 552; Weston v. Bear R. & A. Co., 5 Cal. 186; State v. First Nat. B'k, 89 Ind. 302; Williams v. Mechanics' B'k, 5 Blatch. 59; Pinkerton v. Manchester, etc., R. R. Co., 42 N. H. 424; Compare Strout v. Natoma W. & M. Co., 9 Cal. 78.

A pledge of its unissued shares may be made by the corporation with like effect as by other owners. Burgess v. Seligman, 107 U. S. 20; Protection Ins. Co. v. Osgood, 93 Ill. 69; Brewster v. Hartley, 37 Cal. 15; Griswold v. Seligman, 72 Mo. 110; Melvin v. Lamar Ins. Co., 80 Ill. 446; Fisher v. Seligman, 7 Mo. App. 383.

[3] Union & P. B'k, v. Farrington, 13 Lea Tenn. 333; Hubbel v. Drexel, 11 Fed. Rep. 115; Horton v. Morgan, 19 N. Y. 170; Re Angelo, 5 De G. & S. 278; Hiatt v. Griswold, 5 Fed. Rep. 573.

Heath v. Groswold, 5 Fed. Rep. 573; Anderson v. Phila. Warehouse Co., 111 U. S. 479.

[4] Cornick v. Richards, 3 Lea Tenn. 1

that it shall not be sold or disposed of below par, and such a provision in the charter is invalid.[1]

The pledgee holds the equitable and beneficial interest, and not the legal, though his name and title appear on the corporate books. He is entitled to dividends,[2] and if these be paid to the pledgor, the latter must account to the pledgee for the same as trustee, if upon sale or foreclosure the pledgee fails to realize his debt;[3] yet the former[4] and not the latter is entitled to vote the stock, though the transfer be duly registered.

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[1] Petersborough, etc., R. R. Co. v. Nashua, etc., R. R. Co., 59 N. H. 385.

[2] Herrman v. Maxwell, 47 N. Y. Sup. Ct. 347. But where stock of a bank has been assigned to a person as security for a loan, with the right to receive dividends thereon, and most of the officers of the bank had notice of the transfer, it was held that the bank must pay the dividends to him, notwithstanding a by-law requiring all transfers of stock to be on the books of the bank. Central Nebraska Nat. Bank v. Wilder (Neb.), 49 N. W. 369. Plaintiff, being the owner of a stock certificate indorsed in blank, lent it to A. for the purpose of being pledged as security for the purchase of other stock. A. pledged it for that purpose with defendant, to whom he was already indebted; and defendant, after buying the other stock for A., and selling it again at a profit, sold plaintiff's stock to satisfy A.'s previous debt, after being notified that plaintiff owned the stock. It was held that defendant was guilty of converting the stock. Niles v. Edwards (Cal.), 27 P. 159.

[3] Hill v. Newichawanick Co., 8 Hun. 459; aff'd 71 N. Y. 599.

[4] Gibson v. Richmond, etc., R. R. Co., 37 Fed. Rep. 743.

[5] Butterworth v. Kennedy, 5 Bosw. 143; McDaniels v. Flower, etc., Co., 22 Vt. 274; Baldwin v. Canfield, 26 Minn. 43; Ex parte Willcocks, 7 Cowen, 402; Merchants' B'k v. Cook, 4 Pick. 405; Laws of N. Y., 1850, ch. 140. sec. 5. The pledgee is not answerable for calls and incurs no liability by allowing a forfeit. ure for their non-payment; Southwestern R. R. B'k v. Douglas, 2 Spear (S. C.) 329; nor for loss of the certificate by theft unless through his negligence. Fleming v. Northampton Nat. B'k, 62 How. Pr. 177. But he must account for dividends when the pledge is redeemed by the pledgor. Isaac v. Clarke, 2 Bulst. 306; Hasbrouck v. Vandervoort, 4 Sandf. 74; Edwards on Bailments, 300. The pledgor of stock had it transferred on the books of the corporation to F., the clerk of the pledgee. New certificates were issued to F., and by him indorsed to the pledgee. Comp. Laws N. D. Section 2931 restricts the right to vote stock to *bona fide* holders thereof in whose name the stock has stood on the corporate books for 10 days before the election, and provides that, at all elections, or votes, there shall be a majority of the stock represented. Section 2933 provides that a pledgee shall not be deemed a stockholder within the statute making them liable for the debts of the corporation, and section 2915, that a transfer of stock shall not be valid except between the parties, unless it is entered on the corporate books. *Held*, that the pledgor could not vote the stock, but that

The pledgor holds the legal title, though the corporation be itself the pledgee; and it is a good defence by the latter to an action by the stockholder to redeem, that the stock has been seized and sold for the pledgor's taxes due thereon.[1]

The pledgee has no right to sell the stock, and if he does sell it without having in his possession at the time other shares equal in amount and value, he is chargeable with conversion;[2] unless the time of redemption has expired, and he sells after due notice to the pledgor, and in the manner provided by law.[3] But it seems he may re-pledge to the extent of his interest;[4] and there may be a custom binding on the parties giving the right to re-pledge.[5]

But since the rule that he may not sell or re-pledge is enforced solely for the protection of the pledgor,[6] there is no reason why the pledgee may not sell or re-pledge the identical certificate held by him, so long as he has shares of the same corporation of equal amount and value.[7]

F. was entitled to vote it, and was qualified to be a director. In re Argus Printing Co., (N. D.), 48 N. W. 347.

[1] McNeal v. Florence Loan. Ass'n, 40 N. J. Eq. 351; 3 A. 125.

[2] Goss v. Hampton, 16 Nev. 185; Fay v. Gray, 124 Mass. 500; Bank of Trenholm, 12 Heisk. Tenn. 520; Taussig v. Hart, 58 N. Y. 425; Wood v. Hayes, 15 Gray, 375; Work v. Bennett, 70 Pa. St. 484; Fowle v. Ward, 113 Mass. 548; Hemppling v. Burr, 26 N. W. Rep. 496; 59 Mich. 294; National Bank v. Baker, 128 Ill. 533; 21 N. E. 510.

[3] France v. Clark, L. R. 22 Ch. D. 830.

[4] Gould v. Farmers' Loan & Trust Co., 23 Hun, 322; Lawrence v. Maxwell, 53 N. Y. 19; Jarvis v. Rogers, 13 Mass. 105; 15 Id. 389, 408; Talty v. Freedman's Sav. etc., Co., 93 U. S. 321; 2 Kent's Com. 579; Mores v. Conham, Owen, 123.

[5] Chamberlin v. Greenleaf, 4 Abb. N. C. 178.

[6] Chouteau v. Allen, 70 Mo. 290. Where the pledgee sells the stock for more than enough to satisfy his demand, pending an action to recover possession of such certificates, the owner is not entitled to judgment for the excess, because it did not constitute any part of his cause of action. Ambrose v. Evans, 66 Cal. 74; 4 P. 960.

[7] Langton v. Waite, L. R. 6 Eq. 165; Nourse v. Prince, 4 Johns. Ch. 490; Noyes v. Spauding, 27 Vt. 420; Taylor v. Ketchum, 35 How. Pr. 289; Le Crey v. Eastman, 10 Mod. 499; Atkins v. Gamble, 42 Cal. 86; Barclay v. Culver, 30 Hun,

§ 503. **Where pledgee is given power of sale.**—And, of course, the pledgor may, by contract, authorize a sale.[1] Upon failure of the pledgor to redeem the stock, the pledgee has various remedies for divesting him of the legal title, and acquiring the same himself, or vesting it in others. These remedies depend upon statutory provisions in most of the states, unless an express power of sale in a particular manner is given in the contract, whereby the indebtedness for which the stock is held was created. In the absence of such specifications, or contrary statutory provisions, he undoubtedly may file a bill of foreclosure of the legal title in equity.[2]

§ 504. **Other remedies of pledgee.**—But the pledgee is not confined to this equitable remedy. It seems that a pledge implies a power of sale.[3]

Accordingly, it is well settled that a pledgee may, upon giving written notice to the pledgor of his intention, proceed to sell the stock in due course of business, for the best market price obtainable, or resort to the method which custom has established.[4] But a sale without notice to the legal owner is void, and conveys no title, notwithstanding a broker's custom to the contrary.[5] The pledgee is not bound to resort to any of

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1; Price v. Grover, 40 Md. 102; Gilpin v. Howell, 5 Pa. St. 41; Thompson v. Toland, 48 Cal. 99; Maylan v. Huguet, 8 Nev. 345.

[1] Ogden v. Lathrop, 65 N. Y. 158.

[2] Blouin v. Liquidators, etc., 30 La. Ann. 714; Merchants' Nat. B'k v. Hall, 83 N. Y. 338; Smith v. Coale, 34 Leg. Intel. 54; Robinson v. Hurley, 11 Ia. 410; Vaupell v. Woodward, 2 Sandf. Ch. 143.

[3] McNeil v. Tenth Nat. B'k, 46 N. Y. 325, 334; Renshaw v. Creditors, 3 S. Rep. 403; 40 La. Ann. 47.

[4] Tucker v. Wilson, 5 Bro. Par. Cas. 193; rev'g, 1 P. Wms. 261; Brown v. Ward, 3 Duer, 660; Hart v. Ten Eyck, 2 Johns. Ch. Cas. 180; Stearns v. Marsh, 4 Denio, 227; Markham v. Jaudon, 41 N. Y. 235, 241; Drury v. Cross, 7 Wall. 299; Diller v. Drubaker, 52 Pa. St. 498; Mt. Holly, etc., Co. v. Ferree, 17 N. J. Eq. 117; Finney's App., 59 Pa. St. 398.

[5] Markham v. Jaudon, 41 N. Y. 235.

these remedies. He may sue on the indebtedness, still retaining the stock as security;[1] nor is he liable on account of a decline in the market value of the stock.[2] His right of election is not altered by the pledgor demanding a sale;[3] and it is held that though a power of sale be given him, he may refuse to sell, and may still resort to his remedy in equity for foreclosure.[4] But he would have no such right if the terms of the contract amounted to a limitation upon his power to acquire the legal title.

§ 505. **With respect to liens of the corporation.**—If any liens exist in favor of the corporation, the transferee takes the stock subject thereto; but the existence of such liens cannot interfere with the right of transfer, although the corporation may refuse to register the transfer until the indebtedness for which a lien is held is paid or secured.[5] It has been held that where one takes the stock *cum onere*, the corporation is bound to register the transfer.[6] Such right could not, however, extend to a case of a transfer to an insolvent.[7] If the

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1 Fullerton v. Mobley, 15 Atl. Rep. 856; Taylor v. Cheever, 6 Gray, 146; Butman v. Howell, 144 Mass. 66; 10 N. E. Rep. 504.

2 Simonton v. Kelly, 122 U. S. 220; Palmer v. Hawes, 73 Wis. 46; 40 N. W. Rep. 676.

3 Smouse v. Bail, 1 Grant, 397; Robinson v. Hurley, 11 Ia. 412; Fisher v. Fisher, 98 Mass. 303; Taggard v. Curtenius, 15 Wend. 155; O'Neill v. Whigman, 8 Pa. St. 394; Lawrence v. Maxwell, 53 N. Y. 19; Rozet v. McClellan, 48 Ill. 345.

4 Cornick v. Richards, 3 Lea (Tenn.), 1; Coffin v. Chicago & N., etc., Co., 4 Hun, 625.

5 Nat. Bank v. Tatsontown B'k, 105 U. S. 217; Johnson v. Laflin, 103 Id. 800; Fitzburgh v. B'k, 3 Mon. 126; Commercial, etc., B'k v. Kortright, 22 Wend. 348; B'k of Utica v. Smalley, 2 Cow. 770; McNeil v. Tenth Nat. B'k, 46 N. Y. 325; People, etc., v. Miller, 39 Hun, 557, 563. See Pottsburg, etc., R. R. Co. v. Clarke, 29 Pa. St. 146; Sargent v. Essex, etc., Corp., 26 Mass. 202; Carroll v. Mullanphy Sav. B'k, 8 Mo. App. 249.

6 Herdegen v. Cotzhausen, 70 Wis. 589; 36 N. W. Rep. 538.

7 See Mobile Mut. Ins. Co. v. Cullom, 49 Ala. 558; N. O. Nat. Bkg. Ass'n v. Wiltz, 4 Woods, 43; s. c. 10 Fed. Rep. 330.

stock is afterwards sold by the corporation to satisfy the indebtedness of the transferrer, the transferee is entitled to the surplus, if any there be, remaining after the claim of the corporation is satisfied.[1] The same principle as to notice applies in case of a pledge as upon sale of stock.[2]

§ 506. **When does statutory liability shift.**—To determine this question, the language of the statute imposing the liability must, of course, be carefully scrutinized; but the most careful consideration of its provisions will sometimes leave the question still in doubt as to whether a particular debt is collectible from a transferrer or the transferee in the case of a transfer made between the time when it was incurred by the corporation and its insolvency, or the return of an execution against it *nulla bona*. Undoubtedly, the more just rule is that those who are stockholders at the time the debt was contracted are alone liable; and this will be found to be the adopted rule in most of the states.[3] In a few, however, those who are stockholders at the time the suit is brought without avail against the corporation are made answerable personally, either solely or equally with their assignees. It is perhaps of less importance to enter into a discussion of particular statutes, than to consider the equally difficult questions between the parties to a transfer under the general rule. Under a statute which in general terms makes stockholders liable, to a definite extent, for all debts of the corporation contracted while they are such, the most important question and often a difficult one is to determine the meaning of the term "stockholder" as

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[1] Weston v. Bear River, etc., Min. Co., 5 Cal. 186; Foster v. Pattee, 37 Mo. 325; West Br. B'k v. Armstrong, 40 Pa. St. 278.

[2] Bradford, etc., Co. v. Briggs, 56 L. T. Rep. 62.

[3] Infra, §§ 791, 796.

used in the statute. The difficulty is obviated where a definition of the term is also given. But where indebtedness arises after a transfer is made and before it is registered under a statute requiring a list to be kept by the corporation for the benefit of and open to the inspection of creditors, who then is answerable to the party giving the credit?

Is it he who the creditor finds entered upon the list as such and upon whom the statute invites him to rely, or is it the actual owner of the stock in whom a perfection of a complete legal title only requires the formality of making entry and transfer on the books of the corporation? After some conflict it has become settled by the increasing preponderance and weight of authority that, until actual registry of the transfer, the vendor, and he alone, is liable under such statutes to creditors who become such in the interim, and that until then the transferee is no more liable than if no sale had been made.

A decision of the question in a creditor's suit inevitably decides and fixes the duties of the parties to the transfer. A full discussion will be postponed until we come to consider the rights and remedies of creditors under statutes imposing personal liability;[1] but as it is an important consideration for parties negotiating a sale and transfer of stock, and suggests the value of diligence on the part of the vendee in having the transfer properly registered, it was deemed proper to give the matter more than a mere incidental reference in this connection.

§ **507. Prior trusts.**—It is difficult to determine upon the authorities just under what circumstances a trust attaching to shares in the hands of the person to whom a certificate of shares is issued will bind the purchaser.

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[1] Infra, Ch. XXVIII.

Of course, if he has actual notice of the facts, his title is subject to the claim of the *cestui que trust* to the same extent as that of the original holder; but the difficulty seems to be to determine what will amount to constructive notice of the facts.

If the certificate indicates on its face that the holder is a trustee, this should undoubtedly put all persons dealing with him with respect to them upon inquiry, and make it their duty to use reasonable diligence in ascertaining the nature of the trust and the rights of the beneficiary.[1]

Where a trustee makes the sale in the exercise of an active trust, his authority over the subject matter is that of a general agent. If a trustee, for instance, is invested with a general authority to sell or pledge the property held by him as such, a purchaser in good faith within the apparent scope of the trustee's power would

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[1] Budd v. Monroe, 18 Hun, 316; Webb v. Graniteville Mfg. Co., 11 S. Car. 396. It was expressly held in the Supreme Court of Massachusetts that the purchaser of such certificates could not hold them in violation of the rights of the *cestui que trust*. Shaw v. Spencer, 100 Mass. 382. This question has been brought directly before the Supreme Court of Cal. on two occasions, and on both a conclusion reached contrary to the accepted doctrine in most of the other states. In Brewster v. Sime, 42 Cal. 139, the certificate bore the word "trustee" after the name of the holder, who pledged it in the course of business to the defendant. The trustee having failed to account to his *cestui que trust* for the proceeds of the sale, suit was brought against the purchaser for the value of the shares. It was decided that the usage so far prevails in California of the real owner of stocks having them issued in the name of another as "trustee," and of recognizing such persons as having the absolute power of disposal, that the courts are bound to recognize certificates issued in that form, as carrying on their face complete *indicia* of ownership to the holder, and that a purchaser in good faith is not bound to make any inquiry for the purpose of ascertaining the real owner or the nature of his right. The question in substance came before the court in the case of Thompson v. Toland, 48 Cal. 100, and the position taken in the first case was sustained. The purchaser, however, is not in every case bound to take notice of rights and equities existing between the trustee from whom he purchases and his *cestui que trust*, even where he has general notice that a trust exists. See also Arnold v. Johnson, 66 Cal. 402; 5 P. 796, holding that the voluntary delivery by the owner to a third person of indorsed certificates constitutes the latter the apparent owner, and the real owner cannot recover the stock from a pledgor of such apparent owner.

be protected, though the sale was in fact unauthorized and fraudulent. This rule applies alike to shares and to other property held in trust.[1]

§ 508. When liability for calls becomes shifted.—The liability to the corporation for calls is not shifted from the vendor to the vendee until the registration of the transfer on its books in accordance with the statute and its by-laws. This change does not, however, have any retroactive effect.[2] The original holder and not the purchaser of the certificate remains liable to the corporation for calls made previously to notice of the transfer.[3] But after a transfer in good faith and acceptance by the corporation of the same, the transferrer is no longer liable for assessments subsequently made on the stock.[4]

The respective rights of the parties to dividends are governed by the same rule. In the absence of an express agreement to the contrary, the vendor is entitled to all dividends declared before the sale and the vendee to those declared afterwards. This seems to be the invariable rule whether the dividends be payable before or after the sale and whether the sale be private or at

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1 Duchemin v. Kendall, 149 Mass. 171; Winter v. Gas. L. Co. (Ala.), 7 So. 773; Albert v. Sav. B'k, 2 Md. 159; 1 Md. Ch. 407. But see Lowry v. Commercial B'k, Taney's Dec. 310.

2 The assignee is not a subscriber to the original capital stock although the certificates, having never been issued, are issued directly to him. Young v. Erie Iron Co. (Mich.), 31 N. W. 814. The transfer by a stockholder to an individual of the former's stock is not to be construed as a transfer for the benefit of the company unless there are particular circumstances to stamp it as such. May v. Foster, 13 Or. 214; 10 P. 17.

3 Brinkley v. Hambleton, 67 Md. 169; 8 A. 904. See also, Cornac v. Bronze Co., 77 Id. 32; Aylesbury Ry. Co. v. Mount, 4 Man. & Gr. 651; Aylesbury Ry. Co. v. Thompson, 2 Ry. Cas. 668.

4 Stewart v. Walla Walla Pub. Co. (Wash.), 20 Pac. Rep. 605; Isham v. Buckingham, 49 N. Y. 222; Cutting v. Damerel, 88 N. Y. 410; Johnson v. Laflin, 5 Dill. 65.

the stock exchange or in open market.[1] The rule applies alike to preferred as to common shares.[2]

In the case of tenancy for life or for years, the time when the right to dividends vests depends upon the time when they are declared, and the duration of the right corresponds with the period of the tenancy.[3] And in the absence of a contrary provision, a legatee of shares is entitled to all dividends declared after the testator's death.[4]

§ 509. Consideration of transfers with reference to the rights of third parties.—The statutory liability of shareholders in capital stock corporations has an important bearing upon the rights and duties resulting to the immediate parties to a transfer. Such statutes will receive a liberal construction for the protection of creditors.[5]

The general rule is that a transfer of shares not perfected as required by the charter, statute, articles of association or deed of settlement governing the corporation, does not relieve the transferrer from his lia-

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[1] Lombard v. Case, 45 Barb. 95; Currie v. White, 45 N. Y. 822; Spear v. Hart, 3 Rob. (N. Y.) 420; Hyatt v. Allen, 56 N. Y. 553; People v. Assessors, 76 N. Y. 202; Brundage v. Brundage, 1 T. & C. (N. Y.) 82; Hopper v. Sage, 47 N. Y. Sup. Ct. 77; Bright v. Lord, 51 Ind. 272; Ohio v. Cleveland, etc., R. R. Co., 6 Ohio St. 489; Black v. Hamersham, L. R. 4 Exch. D. 24; Hague v. Dandeson, 2 Exch. 741. Contra, Burroughs v. North Car. R. R. Co., 67 N. C. 376; Jermain v. Lake Shore, etc., Ry. Co., 91 N. Y. 484; Manning v. Quicksilver, Min. Co., 24 Hun, 360; and the corporation may attach the shore for a debt due it by the assignor after a transfer of which it has no notice. Buttrick v. N. & L. R. Co., 62 N. H. 413.

[2] Boardman v. Lake Shore, etc., Ry. Co., 84 N. Y. 157, 158; Manning v. Quicksilver Min. Co., 24 Hun, 360; Jermain v. Lake Shore, etc., Ry. Co., 91 N. Y. 484.

[3] Harris v. San Francisco, etc., Co., 41 Cal. 393; Minot v. Paine, 99 Mass. 101; Chicago, etc., R. R. Co. v. Page, 1 Biss. 461, supra.

[4] Browne v. Collins, L R. 12 Eq. 586; Jones v. Ogle, L. R. 8 Ch. 192; Ibbotson v. Elam, L. R. 1 Eq. 188, supra. 457.

[5] Clark v. Bever, 31 F. 670.

bility as a stockholder to creditors.[1] The stockholder is not relieved of his liability to creditors where, upon sale of his shares while the corporation is solvent, the transfer is not made in the proper book, although the failure to so enter the transfer is caused by the neglect of the company's agents ; and the corporation afterwards becomes insolvent.[2]

Under statutes requiring stock registers to be kept, it is not necessary, in order to constitute one a stockholder so as to hold him liable for the corporation's debts, that his name appear as such on the books. The registry is admissible, in the first instance, to determine the question, and is *prima facie* evidence in determining who are liable.[3]

But the term "stockholder" for this purpose applies not only to such persons as appear by the books of the corporaiton to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another, and, to constitute one a stockholder within the intent and meaning of such statutes, it is not necessary that the shares should have been paid for or the certificate received.[4]

The time at which the liability to the creditors of the corporation of the vendor of shares ends and that of the vendee begins, and the circumstances under which it attaches to either, does not depend upon the contract between the parties themselves, nor upon the recognition given them in this matter by the corpora-

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[1] Borland v. Haven, 37 F. 394; Thompson's Liability of Stockholders, sec. 217.

[2] Harpold v. Stobart, 46 Ohio St. 397. And the fact that the company afterwards treated the purchaser as the owner, does not alter the case. Id.

[3] Evans v. Bailey, 66 Cal. 112.

[4] Mitchell v. Beckman, 64 Cal. 117. See also, Chaffin v. Cummings, 37 Me. 70; Chester Glass Co. v. Dewey, 16 Mass. 94; Spear v. Crawford, 28 Id. 513; In re S. M. C. M. Co., 7 Saw. 30; Hawes v. Anglo Saxon, etc., Co., 101 Mass. 385; s. c. 111 Id. 200; Bun v. Wilcox, 22 N. Y. 551, Infra, §§ 790, 791.

tion, nor the showing made upon its books. As between themselves, the corporation is the principal debtor and the member's guarantors to the extent of their interests.[1] But as to creditors the liability of each is primary and original.[2]

This being the case, the transfer having been made, the liability of the purchaser of shares for the debts of the corporation incurred after the sale attaches to his interest at once, and is not suspended until the transfer is entered in the registry..

§ **510. Rights between vendee and vendor's creditors.**—The effect of an attachment or execution against the registered owner of shares upon the rights of his vendee before the substitution of the latter's name on the books, though apparently easy of determination, has given rise to considerable conflict of authority. There appears but little difficulty, however, in states that have expressly provided by statute how such process shall be served.

It would seem that, in the absence of any statutory direction, the execution or attaching creditor should not be held to acquire a superior right with respect to the shares sold and transferred to that of the seller, whose interest is merely a naked claim against the corporation, for dividends for which he can be compelled in equity to account to the vendee. But the provisions of several statutes usually affect the question. Such construction has generally been given to these as to give a purchaser of shares at an execution sale without notice title as against a purchaser in good faith whose name has not been entered as owner on the books of the company.[3]

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1 Price v. Lynch, 38 Cal. 528.

2 Infra, 902.

3 Berney Nat. B'k v. Pinkard, 87 Ala. 577; Weston v. P. R. & C. W. Co.,

But where the owner makes a pledge of his shares to secure a debt, the purchaser at a sale under execution against the pledgor acquires his title, subject to the lien of the pledgee.

From the decisions it will be seen that the opportunity of complying with the statutory requirement of having the proper transfer made on the books in the first instance, and in case of omission to do that, of giving notice to intending purchasers at execution sale, are deemed adequate protection for a *bona fide* purchaser of shares. While this rule may, in some instances, cause a loss without fault or neglect of the purchaser, it is thought the inconvenience resulting from it is less than the opposite, which would enable failing debtors, in view of legal proceedings and probable judgments against them, to make secret and collusive arrangements by which they would be enabled to defeat the anticipated execution. In some instances, affected more or less by statute, and in others aside from statutory provisions on the subject, different rules have grown up under judicial decisions in different states and groups of states, affecting the rights of the parties under attachment and execution process. Examination of these is recommended.[1]

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5 Cal. 186; s. c. 6 Id. 425; People v. Elmore, 35 Id. 655; Parrott v. Byers, 40 Id. 614; Winter v. Belmont Min. Co., 53 Id. 429; Farmers' Nat. Gold B'k v. Wilson, 58 Id. 600; Wyoming Fair Assn. v. Talbert (Wyo.), 21 Pac. Rep. 700; Hardway v. Semmes, 38 Ala. 667; Application of Murphy, 51 Wis. 519; Fisher v. Jones, 82 Ala. 117; Shenandoah Val. R. Co. v. Griffith, 76 Va. 913.

[1] In Alabama, New York, New Jersey, Pennsylvania, Texas, South Carolina, Louisiana and in the federal courts, a purchaser of a stock certificate for a valuable consideration is protected in his ownership, and is not affected by a subsequent attachment or execution levied thereon for debts of the registered stockholder, even though such purchaser has neglected to register the transfer on the corporate books prior to such levy or attachment. See White v. Rankin (Ala.), 8 So. 118; Cornean v. Guild Farm Oil Co., 3 Daly, 318; Eby v. Guest, 94 Pa. St. 160; Finney's App., 59 Pa. St. 398; Com. v. Watmouth, 6 Whart. 117; Tilford, etc., Co. v. Gerhab (Pa.), 13 Atl. Rep. 90; U. S. v. Vaughan, 3 Binn. 394; Broadway B'k v. McElrath, 13 N. J. Eq. 24; Fraser v. Charleston, 11 S. C. 486, 519;

In cases involving national bank stock state courts usually follow the rule in the federal courts.[1] It seems to be generally if not universally conceded that if the creditor in the attachment or execution had notice of the transfer before levy of the attachment or execution,

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Seeleston v. Brown, 61 Tex. 114; Pitot v. Johnson, 33 La. Ann. 1286; Smith v. Crescent City, etc., Co., 30 La. Ann. 1378; Smith v. Am. Coal Co., 7 Lans. 317. In Abels v. Mobile Real estate Co. (Ala.), 9 So. 423 (Aug. 1891), and in Planters, etc., Ins. Co. v. Same, Id., it was held that a transfer of stock as collateral security for a loan passes no title as against a subsequent attachment, where it is not registered, and no demand is made for the transfer on the books of the corporation until after the levy. Under Code Iowa, sec. 1078, which provides that a transfer of corporate stock is not valid as to third persons until it is regularly entered in the books of the company, an entry in a stock book that certain stock has been assigned as collateral security is sufficient to protect the assignee from the claims of the assignor's judgment creditors. Moore v. Marshalltown O. H. Co. (Ia.), 46 N. W. 750. With respect to the federal courts in reference to Nat. Banks, see Continental Nat. B'k v. Elliott Nat. B'k, 5 Fed. Rep. 369; where numerous authorities are cited in support of the rule as above stated; Scott v. Pequemock Nat. B'k, 15 Fed. Rep. 494. In this case the court said:—"The tendency of modern decisions is to regard certificates of stock attached to an execution, blank assignment and power to transfer as approximating to negotiable securities, though neither in form nor character negotiable."

[1] Sibley v. Quinsigamond Nat. B'k, 133 Mass. 515. Compare State v. B'k, 89 Ind. 302. In Alabama a statute protects a *bona fide* transferee of certificates of stock against a subsequent levy of attachment or execution although the transfer is not recorded. Code, sec. 1673. For the rule in Maryland see Morton v. Grafflin, 68 Md. 545; 15 Atl. Rep. 298; in Tenn. see Cornick v. Richards, 3 Lea, 1; State Ins. Co. v. Sax, 2 Tenn. Ch. 507. In California and in Connecticut, Maine, New Hampshire, Indiana, Illinois, Iowa, Maryland, Tennessee, Vermont and Wisconsin it is held that where regulations exist requiring transfers of stock to be registered on the corporate books in order to be effectual, an attachment or execution levied on the stock in the debtor's name on the books of the corporation takes precedence of a previous purchaser of the certificate, who has not completed his transfer by registry. Oxford Turnp. Co. v. Bunnell, 6 Conn. 552; Dutton v. Com. B'k, 13 Conn. 493; Skowhegan B'k v. Cutler, 49 Me. 315; Pinkerton v. R. R. Co., 42 N. H. 424; Warren v. Branden Mfg. Co., cited in 52 Vt. 75; State v. Nat. B'k, 89 Ind. 302; People's B'k v. Grindley, 91 Ill. 457; Ft. Madison, etc , Co. v. Batavia B'k (Ia.), 32 N. W. Rep. 336; 42 Ia. 331; Re Murphy, 51 Wis. 519; Noble v. Turner, 69 Md. 519; 16 Atl. Rep. 124; Young v. Smith, etc., Iron Wks. (Tenn.), 2 S. W. Rep. 202. In Massachusetts it is held that the unregistered purchaser is not protected where the charter of the corporation requires registry. Fisher v. Essex B'k, 71 Mass. 473; Newhall v. Walliston, 138 Mass. 240; Blanchard v. Dedham Gas Light Co., 78 Mass. 214. But if only the by-laws or the certificate itself create such a requirement, the unregistered purchaser is protected and takes precedence over the attachment or execution. Sargent v. Essex M. Ry. Co., 26 Mass. 202; Boston Music Hall v. Cary, 129 Mass. 435.

the transferee's title will prevail against the same, one of the objects of requiring a registry being the giving of notice in such cases.

§ 511. Transfer by sale under attachment and execution.—At common law shares of stock were choses in action, and consequently could not be reached on execution, and where such remedy exists in favor of a judgment creditor of the owner it is derived from statute.[1] The same rule was early established in regard to attachments.[2]

Execution against the corporation cannot be levied upon stock which it has acquired under forfeiture proceedings against the original holder of the stock.[3] In the levy of an execution the provisions of the statute must be substantially complied with, else the sale is void and will impart to the purchaser no title.[4] The sale is fatally defective if the sheriff fail to give to the corporation the notice required by statute;[5] or if the sale do not conform substantially to the advertisement of the sale, although the advertisement be otherwise in accordance with the statute.[6] It is the duty of the

1 Van Norman v. Jackson County Circuit Judge, 45 Mich. 204; Goss v. Phillips, etc., Co., 4 Bradw. 510; Slaymaker v. B'k of Gettysburg, 10 Pa. St. 373; Foster v. Pattee, 38 Mo. 525; Howe v. Starkweather, 17 Mass. 240; Nabring v. B'k of Mobile, 58 Ala. 204; Denton v. Livingston, 9 Jones. 96; Nashville B'k v. Ragsdale Peck (Tenn.), 296; Cooper v. Canal Co., 2 Murphy (N. C.), 195. See also, Gue v. Tidewater Canal Co., 24 How. 257.

2 Williamson v. Smoot, 7 Mart. (La.) 31; Plimpton v. Biglow, 93 N. Y. 592; Mer. Mut. Ins. Co. v. Brown, 38 Tex. 230; and even where allowed by statute, the levy of an attachment does not prevent a sale of property by the corporation. Gottfried v. Miller, 104 U. S. 521.

3 Robinson v. Spaulding, etc., Co., 72 Cal. 32; 13 Pa. Rep. 65.

4 Blair v. Compton, 33 Mich. 414; People v. Goss, etc., Mfg. Co., 99 Ill. 355. See also Berney Nat. B'k v. Pinkard, 87 Ala. 577; Wy. Fair Ass'n v. Talboth (Wy.), 21 P. 700; Lippett v. A. W. P. Co., 15 R. I. 141; Morton v. Grafflin, 68 Md. 545; 13 A. 341; Mowry v. Hawkins, 57 Conn. 453.

5 Princetown B'k v. Crozier, 22 N. J. L. 383. Where the statute does not designate the character of notice to be given oral notice is sufficient. Abels v. Mobile R. E. Co. (Ala.), 9 So. 423; Planters v. Mer. Ins. Co. v. Same, Id.

6 Titcomb v. Union Marine Ins. Co., 8 Mass. 326. See also McNaughton

sheriff or other officer conducting the sale to furnish the purchaser the proper certificate or other muniments of title under the sale, and until this is done the corporation is not bound to recognize the latter as having any of the rights of a stockholder.[1] Where a statute allows the levy of an execution or attachment upon equitable interests, fraudulent transfers may be disregarded and the levy and sale had as if no transfer had been made.[2] But in the absence of such provision the only remedy of the judgment creditor is a suit in equity to set aside the fraudulent transfer and subject the interest of the transferrer to the satisfaction of his claim.[3]

§ 512. **The situs of stock.**—Shares of stock cannot be attached or sold on execution in a state other than that of the domicile of the corporation. They have no *situs* beyond the jurisdiction of the state creating the corporation, though sometimes given a *situs* for purposes of taxation. But in the state where the corporation has its domicile, the interests of stockholders, whether resident or non-resident, may be attached or levied upon, and sold on execution against the owner, under statutory provisions prescribing the manner thereof.[4]

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v. McLean, 73 Mich. 250; 41 N. W. Rep. 267, where an execution sale at 9 o'clock at night where few were present was held void.

[1] Morgan v. Thames B'k, 14 Conn. 99.

[2] Scott v. Indianapolis Wagon Wks., 48 Ind. 75. See State v. Warren Foundry, etc., 32 N. J. L. 439.

[3] Van Norman v. Jackson County Circuit Judge, 45 Mich. 204, where the statute prescribes that the corporation shall register the purchaser at such sale as a stockholder, he will be entitled, after presentation to the corporation of the required papers and refusal to make such registry, to a writ of mandamus to compel the corporation to make it. Lippett v. Am. Wood Paper Co., 14 R. I. 301; Bailey v. Strohecker, 38 Ga. 259. Same rule applies to non-residents as to residents with respect to notice and priority of liens. Young v. O. T. Iron Co. (Tenn.), 2 S. W. 202. Under the Va. statute both the owner and the purchaser are liable for assessments unpaid at the date of sale and transfer under execution or attachment the same as in case of transfer otherwise. Hambleton v. Glenn (Md.), 20 A. 115.

[4] Nat. B'k of N. L. v. Lake Shore & M. S. R. R. Co., 21 O. St. 221; Street

The shares of a non-resident in a foreign corporation cannot be reached on execution or attachment, though the officers of the corporation are found within the state.[1]

But under a statute requiring foreign corporations doing business within the state to file their articles of incorporation with the secretary of state, it was held that they became domestic corporations for the purpose of authorizing attachment of their stock within the state.[2] The fact that the stock certificate is found within the state does not make the attachment or levy effectual, or help to make it valid. The certificate is only evidence of the owner's interest—not the interest, any more than the title deeds to land is the land itself.[3]

§ **513. The property character of shares.**—Shares are contract rights which pass by delivery of the certificates, just as a debt evidenced by a promissory note passes by delivery of the note.

But the shares themselves must be distinguished from the certificates which represent them. The number of shares held by an individual is the measure of his entire interest in the corporation ; they are choses in action and not goods, wares and merchandise ; and

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R. R. v. Morrow, 87 Tenn. 406; Chesapeake & O. R. R. R. Co. v. Paine, 29 Gratt. 502; Winslow v. Fletcher, 53 Conn. 390; 13 Am. & Eng. Corp. Cas. 39.

[1] Plimpton v. Bigelow, 93 N. Y. 592; Martin v. Mobile & O. R. R. Co., 7 Bush. (Ky.), 116; Morton v. Grafflin (Md.), 13 Atl. Rep. 341.

[2] Young v. South, etc., Iron Co., 85 Tenn. 189; 2 S. W. Rep. 202.

[3] Christmas v. Biddle, 13 Pa. St. 223. See also Childs v. Digby, 24 Pa. St. 23; Moore v. Gennett, 2 Tenn. Ch. 375; Winslow v. Fletcher, supra. In the last case the court said: "While the certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property, yet they are distinct from the stockholders' interest in the capital stock of the corporation and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment, or a trustee process than a promissory note. The debt is subject to attachment but the note itself, which is simply evidence of the debt, is not. So with stock, that may be attached, but the certificate cannot be."

hence are not within the statute of frauds requiring sales of "goods, wares and merchandise" above a certain amount to be evidenced by contract in writing.[1]

But a contrary view has been taken in some cases, where it was held that while the certificates of shares are choses in action in a legal sense, yet in common acceptation they are tangible property, and so far goods, wares and merchandise, as to pass by delivery, and a contract for their sale and delivery is governed by the provision of the statute of frauds which governs other sales of goods, wares and merchandise.[2]

A corporation cannot issue and deliver a share of its capital stock. By the joint action of the corporation and the subscriber for its stock, he may become the owner of a given number of shares thereof, but not in such sense as that he may take away the part of the common corporate fund represented in these shares.

A demand that a corporation deliver a share of the corporate fund is to ask of it something which it has not the power to do, and which no court can compel it to do, except upon a dissolution and order of distribution of its assets. In other words, shares in a corporation continuing in legal existence are intangible and rest in abstract legal contemplation. It has been said that they are not a species of property that can be transferred by delivery; and that the assent of the owner to part with them must be expressed in writing.[3]

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[1] Humble v. Mitchell, 11 A. & E. 205; Bowlby v. Bell, 3 C. B. 284; Duncuft v. Albrecht, 12 Sim. 198; Watson v. Spratley, 10 Exch. 222; and see Pickering v. Appleby, Comyn, 354. But see Pray v. Mitchell, 60 Me. 430.

[2] Tisdale v. Harris, 20 Pick. 13; Boardman v. Cutter, 128 Mass. 388; North v. Forest, 15 Conn. 400; Fine v. Hornsby, 2 Mo. App. 61. Certificates of stock cannot be recovered by the real owner from the pledgee of a depositary who indorses and delivers the same to a third person until the demand for which they were given in pledge is satisfied. Ambrose v. Evans, 66 Cal. 74; 4 P. 960.

[3] Davis v. B'k of Eng., 2 Bing. 393; Dun v. Com. B'k of Buffalo, 11 Barb. 580.

But however this may have been at common law, it cannot be said that the idea of the abstract character of shares would go to that extent now ; for a corporation can under some circumstances be compelled to issue and deliver the written evidence of the existence of shares and of ownership to an equitable owner.[1]

There is not entire harmony or consistency in the views of judges on the question, and it has been in most states declared by statute that shares are personal property. The distinction is of but little value in practice, as in the United States a contract for the sale of shares is usually understood to mean a contract for the sale of certificates, and when a sale of shares is spoken of, reference is had to an assignment and delivery of that which constitutes the tangible and commercial form of shares.

Shares are not real estate, even when the principal business of the corporation consists in dealing in real property. Accordingly, upon the death of the owner, shares in a corporation pass to the executor and not to the heir.[2]

The widow is not entitled to dower in shares in the absence of a statutory provision.[3] Trover will lie for their conversion,[4] and they may be the subject of a gift *causa mortis* by delivery of the certificate.[5]

§ **514. In what respect negotiable.**—But it should not be understood that a certificate is negotiable commercial paper so far as to pass from hand to hand by

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[1] Burrall v. Bushwick R. R. Co., 75 N. Y. 211.

[2] Hutchins v. State B'k, 12 Metc. (Mass.) 426. See Bligh v. Brent, 2 Y. & C. Ex. 268, 294. Contra, Welles v. Cowles, 2 Conn. 567.

[3] Johns v. Johns, 1 Ohio St. 350.

[4] Kuhn v. McAllister, 1 Utah Ter. 273; Budd v. Multnomah St. & Ry. Co., 12 Or. 271; 7 P. 99.

[5] Grymes v. Hone, 49 N. Y. 17; Walsh v. Sexton, 55 Barb. 251.

mere delivery.[1] The term "*quasi negotiable*" has often been used to describe the transferable character of certificates; but it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still "it describes better than any other short-hand expression the nature of those instruments which, while not negotiable in the sense of the law-merchant, are so framed and so dealt with as frequently to convey as good a title to the transferee as if they were negotiable."[2] Ordinarily where it is expressly provided by statute that they are transferable by "assignment and delivery" except as between the parties thereto, they do not pass by delivery merely, except where the title passes by operation of law and in perhaps a few other exceptional instances.

The exceptions are cases where injustice would result, or a party would be enabled to take advantage of his own wrong or perpetrate a fraud upon others, or express provisions of the law concerning the transmission of property would be defeated by the application of the rule.[3]

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[1] Hawes v. G. C. B. Co., 9 N. Y. S. 499. See Pa. R. Co. v. Com. (Pa.), 7 A. 368. In Weyer v. Second Nat. B'k, 57 Ind. 192, 208, the court say:—"The difference between a promissory note and a certificate of bank stock is so wide and marked that a rule of law governing the transfer of the former is by no means applicable to the latter." See also Barstow v. Savage M. Co., 64 Cal. 391, the court saying: "Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation." Mechanics' B'k v. N. Y. & N. H. R. R. Co., 13 N. Y. 599, 627; Weaver v. Barden, 49 N. Y. 286, 288; Sewall v. Boston Water-power Co., 86 Mass. 277; Shaw v. Spencer, 100 Mass. 382. Compare Leitch v. Wells, 48 N. Y. 585.

[2] Daniel on Negotiable Instruments, sec. 1708.

[3] A brother and sister each executed a receipt to their father's executors for one-half of certain stock belonging to the father's estate. There was no proof, however, that any of the stock, which was considered as almost valueless, ever came into the sister's possession. She died before her brother, and on the latter's death, some time thereafter, the shares were found among his effects. It was held that the legal presumption arising from the brother's possession of the stock was that of ownership in him, though no written transfer of the sister's interest was in existence. In re Mapes' Estate, 12 N. Y. S. 9.

§ **515. Conflicting usage not binding.**—It having been provided by statute how a complete legal title may be conveyed, shares or the certificates representing them are deprived of any negotiable character which the usages of trade might otherwise impart to them. Or, as the court said in a late case, " It being an established principle of law that certificates of stock are not to be regarded as negotiable paper, it is not permissible to prove a custom or usage among stockbrokers to the contrary. No usage is good which conflicts with an established principle of law any more than one which contravenes or nullifies the express stipulations of a contract." [1]

§ **516. Transfer of stolen stock to bona fide purchasers.**—The case of a holder of such certificate indorsed in blank and clothed with the power as agent or trustee to deal with the stock, transferring stock for value by indorsement to a purchaser having no notice of the terms upon which he holds it, rests upon a different ground to that of such a transfer by one who has stolen it or otherwise come into possession without any actual authority to deal with it. In the first case, the true owner, having conferred on the holder by contract all the external *indicia* of title and an apparently unlimited power of disposition over the stock, is estopped to assert his title as against a third person who, acting in good faith, acquires it for value from the apparent owner. But a holder of a stolen certificate can claim no equi-

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[1] East Birmingham Land Co. v. Dennis (Ala.), 26 Am. & Eng. Cor. Cas. 135, per SOMERVILLE, J. See also, Dickinson v. Gay, 83 Am. Dec. 656, n., 664; East Tenn. Va. & Ga. R. Co. v. Johnson, 75 Ala. 596; London & C. B. Co. v. London & R. P. B'k, 19 Am. & Eng. Cor. Cas. 469, 478, n.; Sherwood v. Meadow Val. M. Co., 50 Cal. 412; Bridgeport B'k v. N. H. R. Co., 30 Conn. 231, 275. Compare Bank v. Lanier, 11 Wall. 369, 377, where the court say: "Although certificates of stock neither in form nor character are negotiable paper, they approximate to it as nearly as practicable."

table superiority to the real and legal owner, and hence acquires no title for any purpose.[1]

§ **517. Testamentary transfers.**—Devises of stock are generally governed by the principles governing other devises of personal property. A general legacy of stock differs, however, from one that is specific. The former case consists in a general direction in the will to the executor to purchase a certain amount of stock for the legatee, there being nothing in the will to indicate that any of such stock is already owned by the testator. A specific legacy consists of a direction to the executor to deliver to the legatee stock already belonging to the testator's estate. It is often difficult as well as important to determine whether a legacy of stock is general or specific.

"A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to rebate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of the testator, while a demonstrative legacy does not carry interest from the testator's death."[2]

If the legacy is to be considered specific, then, in the event of the testator's parting with the thing or property bequeathed, or if, from any cause, it should be lost or destroyed, the legacy fails. Then, again, such legacies are not liable to abatement with general legacies ; nor

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[1] 2 Daniel on Neg. Inst. (3d. Ed.), sec. 1708, g; McNeil v. Tenth Nat. B'k, 46 N. Y. 325; Turnp. Co. v. Ferree, 17 N. J. Eq. 117; Prall v. Tilt, 28 N. J. Eq. 479; Merchants' B'k v. Livingston, 74 N. Y. 223. See Barstow v. Savage Min. Co., 64 Cal. 388; Shaw v. Spencer, 100 Mass. 382. See also Sewall v. Boston W. P. Co., 4 Allen (Mass.), 282.

[2] Mullins v. Smith, 1 Dr. & Sm. 204.

are they liable to contribution towards the payment of debts.[1]

§ **518. Construction of devises of stock.**—Such devises are construed favorably to the legatee,[2] and generally enjoy a preference over the general legatee in a general legacy.[3]

The legatee of stock takes it, just as it is held at the testator's death, like other transferees. Whatever payments have been made upon it accrue to the benefit of the legatee;[4] and he is entitled to receive all dividends thereafter declared, but none declared previously, though the same had not been paid.[5] But this liberality of construction in favor of the special legatee only applies when it is plain that the devise is special and not general.

In determining the latter question preference is given to general over special legacies. If doubt exists as to whether a legacy is general or specific, it will be construed to be general.[6]

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1 Kenkel v. McGill, 56 Md. 120. See Walton v. Walton, 7 Johns. Ch. 257; Davies v. Fowler, L. R. 16 Eq. 308; Jacques v. Chambers, 2 Coll. 435.

2 It was held that if the language employed will apply equally to paid up and to only partly paid stock the legatee may take the former. Millard v. Bailey, L. R. 1 Eq. 378; Jacques v. Chambers, 2 Coll. 435.

3 His legacy holds good although no property be left out of which to provide for the general or pecuniary legacies; Drinkwater v. Falconer, 2 Ves. Sr. 622; provided the testator died possessed of so much of that kind of stock, but not otherwise; Ashton v. Ashton, 3 P. Wms. 384; Gordon v. Duff, 28 Beav. 519. If the testator owned none of such stock, however, the specific legacy fails. Evans v. Tripp, 6 Mad. 91. But in case of both, a general and specific legacy of the same stock, the latter is entitled to prior satisfaction. Barton v. Cooke, 5 Ves. 461.

4 Tanner v. Tanner, 11 Beav. 69.

5 Perry v. Maxwell, 2 Dev. Eq. (N. C.) 487.

6 Eckfield's Estate, 7 W. N. C. Pa. 19; Davies v. Fowler, L. R. 16 Eq. 308; Tifft v. Porter, 8 N. Y. 516, 520; Gordon v. Duff, 28 Beav. 519; Ashton v. Ashton, 3 P. Wms. 384. The following words and phrases used by testator held to convey specific legacies of stocks: "Standing in my name." Kampf v. Jones, 2 Keen. 756; Ludlam's Estate, 13 Pa. St. 188; Gordon v. Duff, 28 Beav. 519. "Stock now lying in the three per cents," Morely v. Bird, 3 Ves. 628. A

§ 519. **Gifts of stock.**—Gifts of stock may be made effectual by delivery of the certificate and compliance with the rules and requirements governing registration, or even by the designation of an agent to make the delivery and entry in the books of the corporation. But

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bequest of all dividends, interest and proceeds from stock constitutes a specific legacy thereof; although no such stock was owned by the testator at the time he made the will. Stephenson v. Dawson, 3 Beav. 342. See also Fidelity Trust Co.'s App., 108 Pa. St. 339, 492. Where the word "my" is used in connection with a description of the stock, it is held to create a specific legacy; Hayes v. Hayes, 1 Keen 97; Loring v. Woodward, 41 N. H. 391; Walton v. Walton, 7 Johns. Ch. 257; Shuttleworth v. Greaves, 4 Mylne & Cr. 35; Miller v. Little, 2 Beav. 259; Brainerd v. Cowdrey, 16 Conn. 1; though an omission of the word "my" does not necessarily make the legacy general; Avelyn v. Ward, 1 Ves. Sr. 420. But it was held that a legacy of "all my stock that I may be possessed of at the time of my decease" was general, and not special, because "no individual thing was given." Parrott v. Worsfold, 1 Jac. & Walker, 574. The intent to make a general bequest or to create a general legacy of stock may be inferred from a direction to invest a designated sum in specified stock for the benefit of the legatee; Raymond v. Brodbelt, 5 Ves. 199; or from a direction to transfer to the legatee specified stock not owned by him at the time of making the will; Lambert v. Lambert, 11 Ves. 607; Silbley v. Perry, 7 Ves. 552. See also Parrott v. Worsfold, 1 Jac. & W. 574. Contra, Bethune v. Kennedy, 1 Myl. & C. 114; Deane v. Test, 9 Ves. 146; Johnson v. Johnson, 14 Sim. 3. Where the testator merely bequeathes a designated number of shares without words indicating that he then owned or expected to hold the stock bequeathed, the legacy is general. Wilson v. Brownsmith, 9 Ves. 180. In Pearce v. Billings, 10 R. I. 102, the court said:—"The evident intent of the testator was to have the stock mentioned purchased for the legatees by his executor, or to have the legatees furnished with the means to purchase the stock for themselves. See also Purse v. Snaplin, 1 Atk. 413. The use of the words "that I possess" in making a bequest of stock has been held to have reference to stock possessed by the testator at the time of making the will and not the time of his death. Cochran v. Cochran, 14 Sim. 248. A bequest of money does not convey the testator's stock in the corporation. Hothan v. Sutton, 15 Ves. 319; Hundleston v. Gouldsbury, 10 Beav. 547; Mullins v. Smith, 1 Dr. & Sm. 204; Willis v. Plaskett, 4 Beav. 208; Chapman v. Reynolds, 28 Beav. 221; Ogle v. Knipe, L. R. 8 Eq. 436; Douglas v. Congreave, 1 Keen, 410, 424; Beck Ex. v. McGillis, 9 Barb. 35, 39. Contra, Waite v. Coombs, 5 De G. & S. 676; Newman v. Newman, 26 Beav. 218; Jenkins v. Fowler, 63 N. H. 244. Where a testator owns bonds and stocks of various corporations, bequests in different sums to different legatees of "my" stocks and bonds at their par value, not describing them particularly, are general legacies; and it is the duty of the executors to make the selection of each legatee's bonds and stocks. In re Hadden's Will, 9 N. Y. S. 453.

A legacy of "ten shares of the stock of the W. & N. R. Co." is specific when a subsequent clause of the will bequeathes "the balance of my stock as per my stock-book." Trustees Unitarian Soc. v. Tufts (Mass.), 23 N. E. 1006.

as between the parties it is complete and binding before registration. And a gift is valid without actual delivery of the certificate where evidenced by an instrument in writing.[1]

While an intent to make a gift must clearly appear, yet such intent may be gathered as well from proof of circumstances attending the transaction and other acts as from the act of transfer itself. Where one purchased stock in the name of another the latter was allowed to show, as against creditors of the purchaser, the transaction was a gift to himself.[2] In such case a recognition of the trust by the holder in his will does not change the trust relation and render the stock a part of his estate.[3]

But a gift of stock to take effect upon the death of the donor is not valid as against his creditors.[4] After a valid and complete gift is made, it is irrevocable;[5] otherwise it is defective or incomplete.[6] It is essential to its validity that it be not against public policy or amount to a fraud upon other stockholders or the creditors of the corporation or of the donor.[7]

§ **520. Donations causa mortis.**—Less strictness as to form is required in the case of gifts of stock made in view of impending dissolution than in case of an ordi-

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1 De Caumont v. Bogert, 36 Hun, 382; s. c. Re Morgan, 104 N. Y. 74. Under statutory provisions in England, no gift is complete until registration on the books of the corporation. Nauney v. Morgan, 57 L. T. Rep. 48.

2 Rider v. Keeler, 10 Ves. 361.

3 Stone v. Hackett, 12 Gray, 227.

4 Sterling v. Wilkinson, 3 S. E. Rep. 533.

5 Standing v. Bowring, L. R. 27 Ch. D. 341. See also Delemater's Estate, 1 Whart. (Pa.) 362; Dummer v. Pitcher, 5 Sim. 35; Francis v. N. Y. & B. El. R. R. Co., 17 N. Y. Abb. N. C. 1; Deming v. Williams, 26 Conn. 226.

6 Jackson v. Twenty-third St. Ry. Co., 88 N. Y. 520. An order to transfer stock standing in the donor's name held to be unenforceable after the donor's death, Baltimore Retort, etc., Co. v. Mali, 65 Md. 93; 3 A. 286.

7 Nickerson v. English, 142 Mass. 267.

nary gift. The reason for this rule arises from urgency and necessity.

A mere delivery of the certificate to the donee is sufficient; and it is not necessary that it be indorsed.[1] And where the donor has the stock transferred into the name of the donee, this is effectual without delivery; though the latter have no knowledge of the transfer until after the donor's death.[2] But the gift is revoked by the recovery of the donor though proper registry be made.[3]

§ 521. **Lost or stolen certificates—Rights of finder or purchaser from thief.**—One of the clearest distinctions between certificates of stock and promissory notes with regard to negotiability is the fact that when the latter have been indorsed in blank and one who has stolen or found them delivers them to a purchaser without notice of the loss or theft, the latter acquires a title as against the payee or prior endorsee. But the transferability of shares rests essentially and exclusively on contract, and a purchaser from a thief or a finder of a certificate indorsed in blank acquires no title, nor does a subsequent purchaser from him, either as against the owner or the corporation.[4]

The case is altered, however, where the thief has procured a transfer on the books of the corporation, obtained new certificates and sold these. The purchaser in that case is protected from all claims by the original

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1 Allerton v. Lang, 10 Bosw. 362; Walsh v. Saxton, 55 Barb. 251; Grymes v. Hone Ex'r, 49 N. Y. 17.

2 Roberts' App., 85 Pa. St. 84. Compare Baltimore, etc., Co. v. Mali, 66 Md. 53.

3 Stanland v. Willott, 3 Mac & G. 664.

4 Barstow v. Sav. Min. Co., 64 Cal. 388; Swine v. Bernard, Id.; 4 P. 11, 72; Same v. Wilson, Cal. Supreme Ct. July, 1891; Anderson v. Nicholas, 28 N. Y. 600. See also, Aull v. Calket (Pa.), 33 Leg. Intel. 44; Bidell v. Bayard, 13 Pa. St. 150; Givens' App. (Pa.), 16 A. 75; East, etc., Co. v. Dennis (Tenn.), 5 Ry. & Corp. L. J. 296. Compare Winter v. Belmont Min. Co., 53 Cal. 428.

owner of such stock;[1] but the latter has his remedy against the corporation.[2]

§ 522. **Forged assignments.**—The remedy against the corporation of the owner of shares transferred on the books, and a new certificate issued therefor, by means of a forged transfer or authorization, is elsewhere treated.[3] Upon well-established principles, no shareholder can be deprived of his ownership, nor can the same be affected, as between himself and a purchaser, through a forged assignment, though the purchase be for value. Not only is this true, but after such purchaser has procured registry of the transfer and the issuance of new certificates, in place of the original, the owner of the latter may elect whether he will hold the corporation responsible in damages, or proceed against the transferee under the forgery for a cancellation of the new certificate.[4]

The forgery is equally ineffectual to convey any title or right as against the corporation. The latter cannot be compelled by a purchaser under a forged assignment to either register the transfer, or to issue a new certificate, or to recognize him as a stockholder.[5]

But if the fact that registration has been allowed by the corporation induced the purchase, the transferee

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1 Mandlebaum v. N. A. Min. Co., 4 Mich. 465, holding it immaterial that the purchaser took with full knowledge of all the facts. In Berich v. Marye, 9 Nev. 312, it was held that a vendor of stolen stock was liable in damages to the real owner although in making the sale he acted as a broker and without notice. The corporation cannot be compelled to register as the owner a *bona fide* purchaser of stolen or lost stock. Sherwood v. M. V. Min. Co., 50 Cal. 412.

2 Infra, §§ 549, 658.

3 Infra, § 580.

4 Johnson v. Renton, L. R. 9 Eq. Cas. 181.

5 Hambleton v. Cent. O. R. R. Co., 44 Md. 551; Waterhouse v. London & S. W. Ry. Co., 41 L. T. N. S. 553; Simon v. Angelo, Am. Tel. Co., L. R. 5 Q. B. D. 188.

has an action against the corporation for damages.[1] This is on the principle that such registry is an assurance of the validity of the vendor's title. On the same principle a purchaser, by applying for registry of the transfer to him, warrants the validity of his right to have the transfer made to him on the corporate books, and the corporation has recourse to him for any damages it is compelled, by reason of entering it, to pay to the real owner.[2] A broker without notice or knowledge of a forgery incurs no liability from the fact that by means of forged indorsements certificates have passed through his hands in the usual course of business.[3]

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1 Metropolitan Sav. B'k v. Mayor, etc., of Balt., 63 Md. 6.
2 Boston, etc., R. Co. v. Richardson, 135 Mass. 423.
3 Machinists' Nat. B'k v. Field. 126 Mass. 345.

CHAPTER XX.

EXPULSION, FORFEITURE, SUSPENSION AND REINSTATEMENT.

§ 523. The right of expulsion does not generally exist in capital stock corporations.—Without a provision in the charter of a corporation having a capital stock divided into shares, such corporation has no right, except by a regular forfeiture of the shares, to expel a member.[1] Yet in some corporations there are membership privileges and corresponding duties such as the payment of fees and dues in addition to the share interest, for instance, in building and loan associations, a few stock exchange boards and perhaps some others.[2] Where such is the case, the personal privileges of membership may be taken

[1] In re Long Island R. Co., 19 Wend. 37; s. c. 32 Am. Dec. 429; State v. Chamber of Commerce, 47 Wis. 670; 3 N. W. 760; Evans v. Philadelphia Club, 50 Pa. St. 107.

[2] See Dickinson v. Chamber of Commerce, 29 Wis. 45.

away, but expulsion can extend no further, unless otherwise provided by contract, or in the articles, charter or by-laws forming by reference part of the contract.[1]

§ **524. Amotion and disfranchisement.**—Amotion is the common law name for the removal of an officer by corporations, while disfranchisement has reference to deprivation of the relation and rights of membership generally. Ignoring obsolete distinctions, the same recognized grounds for amotion or disfranchisement have come to be regarded by the courts as justifying expulsion by modern corporations and associations in the exercise of inherent powers. In the absence of provisions in constating instruments setting forth the acts for which members may be expelled, these must consist of things done that work the destruction of the body corporate or the destruction of the liberties or privileges thereof.[2]

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[1] Infra, §§ 534, 535.

[2] People v. Medical Society, 24 Barb. (N. Y.) 571; Otto v. Tailors', etc., Union, 75 Cal. 308, 314; 17 P. 217; Leech v. Harris, 2 Brewst. (Pa.) 577; People v. New York Commercial Association, 18 Abb. Pr. (N. Y.) 271, 278; Ang. & A. Corp., secs. 349, 350; 2 Kent Com. 297, 299; Earle's Case, Carthew, 173. The following have been held acts of sufficient turpitude within Lord MANSFIELD'S three classes of offences to sustain expulsions: Issuing policies of insurance for smaller amounts than those established by an incorporated board of underwriters; People v. Board of Fire Underwriters, 14 N. Y. Sup. Ct. 248; violation of contract with another member to whom a member of a medical society had sold his practice and agreed not to practice his profession within certain limits; Barrow v. Mass. Medical Soc., 12 Cush. (Mass.) 402, 409; obtaining goods by false pretences by member of an incorporated mercantile body; People v. N. Y. Commercial Ass'n, 18 Abb. Pr. (N. Y.) 271; feigning sickness in order to obtain relief by a member of a charitable society; Soc. of the Visitation v. Com., 52 Pa. St. 125; misbehavior at table of an inmate of a house for aged seamen; People v. Sailors' Snug Harbor, 5 Abb. Pr. (N. S. N. Y.) 119. Expulsions of members of mutual benefit societies have been sustained where the charge established was: receiving the fee of an applicant for membership and failing to pay it over, and abstracting from its proper depository the roll of the society and refusing to return it; People v. St. George's Soc., 28 Mich. 261; fraudulently altering an account against the society; Com. v. Philanthropic Soc., 5 Binn. (Pa.) 486. Held not sufficient: "vilifying" another member, Com. v. St. Patrick's Ben. Soc., 2

A by-law stating for what causes members may be expelled does not conflict with the constitution of the state, or of the United States, nor is it illegal in that it does not specify acts which will be deemed to constitute a given offence, for instance, disorderly conduct.[1]

§ 525. An essential right of incorporated and voluntary associations.—The right to expel members for proper cause is essential to the permanency and well-being of clubs, associations and benefit societies of every kind, whether incorporated or not; hence, the nature and extent of the right and the circumstances justifying its exercise and the proper procedure are matters of important inquiry.[2]

Binn. (Pa.), 441, 449; s. c. 4 Am. Dec. 453; or using insulting and disrespectful language of and to another member or to an officer; Rex v. University of Cambridge (Dr. Bentley's Case), 5 Str. 157; s. c. 2 Ld. Raym. 1334; absence from stated meetings; Rex. v. Richardson, 1 Burr. 517, 541; enlisting as a volunteer in time of war, the laws prohibiting enlistment in a standing army; Franklin Ben. Ass'n v. Com., 10 Pa. St. 357. (Mutual Benefit Society.) It was conceded that such a society has *power* to withhold its benefits from members who, contrary to its regulations, assume the perils of war. Refusing to submit differences to arbitration; Green v. African Meth. Episcopal Soc., 1 Serg. & R. (Pa.) 254; striking another member of the club within the club-house; Evans v. Phila. Club, 50 Pa. St. 107. But under a by-law of a club giving the directors power of expulsion "for acts or conduct which they may deem disorderly or injurious to the interests or hostile to the objects" of the club, the offence need not be found *in totidem verbis*, but a resolution that a member was guilty of a violation of the above article, based upon a finding that he was guilty of rude and ungentlemanly conduct in the club-house, in that without provocation he charged a fellow-member that he was acting like a blackguard, is sufficient. Com. v. Union League of Phila., 135 Pa. 301; 19 A. 1030; 26 N. W. C. 142. A rule of a benevolent society that any member feigning sickness to obtain benefits shall be expelled, does not authorize an expulsion without notice of the charges preferred or opportunity to defend. Simmons v. Syracuse B. & N. Y. and Oswego & S. R. Ben. Soc., 10 N. Y. S. 293; 56 Hun, 645.

[1] Simmons v. Syracuse B. & N. Y. and Oswego & S. R. Ben. Soc., 10 N. Y. S. 293; 56 Hun, 645.

[2] This right has been said to rest upon two grounds, namely: 1. A violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation. 2. For such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects, or bring the association into disrepute. Otto v. Journeyman Tailors' P. & B. U., 75 Cal. 308;

There are three well-established grounds of expulsion independent of statute or charter provisions on the subject. They are thus stated by Lord Mansfield:—"There is a tacit condition annexed to the franchise of a member, which, if he breaks, he may be disfranchised. The cases in which this inherent power may be exercised are of three kinds: 1. When an offence is committed, which has no immediate relation to a member's corporate duty, but is of so infamous a nature as renders him unfit for the society of honest men. Such are the offenses of perjury, forgery, etc. But before an expulsion is made for a cause of this kind, it is necessary that there should be a previous conviction by a jury, according to the law of the land. 2. When the offence is against his *duty as a corporator*, and in that case he may be expelled on trial and conviction by the corporation. 3. The third is an offence of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land."[1]

It may be remarked at the outset that the same rules of law and equity, so far as regards internal control and management and the adjudication of their reserved and inherent power of expulsion, apply to voluntary as to incorporated associations.[2] At common law, there

17 P. 217; s. c. 7 Am. St. Rep. 156, 159. See also Labouchere v. Wharncliffe, 13 Ch. Div. 346; s. c. 28 W. R. 367; s. c. 41 L. T. 638.

[1] Rex v. Town of Liverpool, 2 Burr. 732, followed and approved in State v. Chamber of Commerce, 20 Wis. 71; Com. v. St. Patrick's Benev. Soc., 2 Binn. 441; 4 Am. Dec. 453. See also, People v. Medical Soc., etc., 32 N. Y. 187; Society v. Com., 52 Pa. St. 125; Dickenson v. Chamber of Commerce, etc., 29 Wis. 49; Loubat v. Leroy, 15 Abb. N. C. 1; People v. Med. Soc., 24 Barb. 577; Leech v. Harris, 2 Brewst. 571.

[2] Leech v. Harris, 2 Brewst. 571; Gorman v. Russell, 14 Cal. 531; Beaumont v. Meredith, 3 Ves. & B. 180; Lindley on Par., 56; Loubat v. Leroy, 15 Abb. N. C. 1; Otto v. Journeyman Tailors', etc., Union, 75 Cal. 308; 17 Pac. R. 217; Babb v. Reed, 5 Rawle, 158; 28 Am. Dec. 650. Compare Dawkins v. Antrobus, L. R. 17 Ch. D. 615; aff'd 44 L. T. Rep. (N. S.) 557, holding that where a voluntary association becomes incorporated the power to expel a member no longer exists, if not conferred in the charter.

was but little limitation upon the right of voluntary societies in this matter.[1] But where such organization became incorporated, the rules governing amotion and disfranchisement were applicable and important limitations attached to the right.

§ 526. **Where property rights are involved.**—It is again necessary to refer to the dual character of many non-capitalized corporations, by which is meant that, in addition to sociability and benevolence, their objects may embrace, and each contract of membership therein secure to the holder valuable property rights, such as a seat in a stock exchange, a pew in a church, participation in mutual benefit funds. If expulsion is regular, it deprives a party of the purely personal privileges of his membership; but it could not, at common law, be given the effect of a forfeiture of pecuniary rights. Such power cannot be exercised unless expressly given in the charter or general law.[2]

§ 527. **Power, where found and by whom exercised.**—The power of expulsion usually belongs to the corporation or society at large, and cannot be exercised by a committee or officer appointed for the purpose.[3] But

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[1] The right of a person, duly elected thereto, to sit as a new member of a Democratic county committee, a voluntary unincorporated political association, provided for by the constitution of the Democratic county organization, is one which the courts will not attempt to enforce. McKane v. Adams, 123 N. Y. 609; 25 N. E. 1057.

[2] In re Long Island, R. Co., 19 Wend. 37; 32 Am. Dec. 429; Evans v. Philadelphia Club, 50 Pa. St. 107. A member cannot by expulsion be deprived of his interest in the stock or general funds of a society. Baggs' Case, 11 Co. 99; Koehler v. Mechanics' Aid Soc., 22 Mich. 86; State v. Tudor, 5 Day, 329; Davis v. B'k of England, 2 Bing. 393; Hopkinson v. Marquis of Exeter, L. R. 5 Eq. 63; Evans v. Phila. Club, 50 Pa. St. 107; Society v. Com., 52 Pa. St. 125.

[3] Hassler v. Phila. Mut. Ass'n, 14 Phila. 233; Med. & Surg. Soc. v. Wetherly, 75 Ala. 248; Green v. African, etc., Society, 1 Serg. & R. 254; Gray v. Christian Society, 137 Mass. 329; s. c. 50 Am. Rep. 310; Com. v. Penn. Benef. Ass'n, 2 Serg. & R. 141. In the first case cited the court say:—"The transfer from

general committees may be empowered by the whole body to expel members, such committee acting according to constitutional or by-law provisions. Clubs and societies are often managed by committees selected by the whole body of members, and given such power. Such cases are not considered as delegations of the power. The committee acts not by virtue of delegated authority, but as the hand and instrument of the entire body.[1] Where such committee having proceeded regularly has finally determined the matter, the sentence of the club is not an enlargement of the judgment.[2] All the members of the tribunal, whatever it be, must have either personal or such other notice as the laws prescribe to attend and participate in the hearing.

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the body of the society, where it properly belongs, to a small fraction of its members of so large and dangerous a power as that of expulsion, must appear, if it be claimed to exist, by the plainest language. It cannot be established by inference, or presumption, for no such presumption is to be made in derogation of the rights of the whole body, nor is it to be supposed, unless it appears by the most express and unambiguous language, that the members of the society have consented to hold their rights and membership by so frail a tenure as the judgment of a small portion of their own number." When the expulsion is accomplished by a revision of the roll, though the preliminary revision may be made by the secretary, his act must be reviewed and formally adopted by the members in corporate meeting, wherein the members must act as in the transaction of other important corporate business, and by a recorded vote of the body. Med. & Surg. Soc. v. Wetherly, 75 Ala. 248. See also, Gray v. Christian Soc., 137 Mass. 329; s. c. 50 Am. Rep. 310; People v. Mechanics' Aid Soc., 22 Mich. 86; Delacy v. Neuse River Navig. Co., 1 Hawks, 274; 9 Am. Dec. 636; State ex rel. Sibley v. Carteret Club, 40 N. J. L. 295; People v. Fire Dept., etc., 31 Mich. 458; Loubat v. Leroy, 40 Hun, 546; People v. American Institute, 44 How. Pr. 468.

1 An expulsion by such committee by secret ballot upheld. Loubat v. Leroy, 65 How. Pr. 138; 40 Hun, 546.

2 Com v. Un. League, 135 Pa. 301; 19 A. 1030; 26 W. N. C. 142.

3 Rex v. Town of Liverpool, 2 Burr. 723, 731; Smyth v. Darley, 2 H. L. Cas. 789; Com v. Guardians of the Poor, 6 Serg. & R. Pa.) 469, 475; People v. Batchelder, 22 N. Y. 125; Loubat v. Leroy, 15 Abb. N. C. (N. Y.) 14. It is held that within the meaning of a provision requiring a two-thirds vote of the members present in order to expel, it required an affirmative vote of two-thirds of those visibly present and not of those actually voting. Thus, where out of 117 members present 77 voted to expel and two did not vote and 38 voted against expulsion, the resolution was held not to have received a two-thirds majority necessary for its adoption. Labouchere v. Wharncliffe, 13 Ch. D. 346.

The constitution and by-laws determine and measure the right of expulsion and prescribe the manner of its exercise. The only limitation upon the powers therein given is, that it must be exercised in good faith and not arbitrarily or oppressively.[1] Of course, the by-laws under which the right is claimed must have been fairly enacted, and must not be contrary to natural justice or otherwise invalid.[2] When the proceedings have been regular in accordance with such by-laws the party expelled has no ground of complaint of which a court will take cognizance.[3] Knowledge of rules and regulations is presumed and all members are presumed to have assented to all such as were lawfully adopted.[4]

§ 528. **The proceedings—charge—notice.**—Expulsion, though not a legal proceeding subject to the technical practice governing trials, criminal or even civil, is yet of so serious a nature that the rights of the party

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[1] Hopkinson v. Marquis of Exeter, 17 L. T. Rep. (N. S.) 368; L. R. 5 Eq. 63. See also, Fisher v. Raab, 57 How. Pr. 87, 95; Maxey's App., 9 Week N. Cas. 441; Hyde v. Woods, 2 Saw. 655, 658; affd. in 94 U. S. 523; Elsas v. Alford, 1 City Ct. Rep. 123; Belton v. Hatch, 109 N. Y. 593; 17 N. E. 225; s. c. 4 Am. St. Rep. 495; White v. Brownell, 2 Daly, 329, 359; s. c. 4 Abb. Pr. (N. S.) 162, 193; Fitz v. Muck, 62 How. Pr. 69, 74; Leech v. Harris, 2 Brewst. 571.

[2] Gardner v. Freemantle, 24 L. T. 81; s. c. 19 Week. Rep. 256; Sperry's App., 116 Pa. St. 391; 9 A. 478; Leech v. Harris, 2 Brewst. 571; Dawkins v. Antrobus, 17 Ch. D. 615; s. c. 44 L. T. 557; s. c. 29 Week. Rep. 511; Hopkinson v. Exeter, L. R. 5 Eq. 63; s. c. 37 L. J. Ch. 73; s. c. 16 Week. Rep. 266; Lyttleton v. Blackburn, 33 L. T. 641; White v. Brownell, 2 Daly, 329; s. c. 4 Abb. Pr. (N. S.) 162; Olery v. Brown, 51 How. Pr. 92; Fitz v. Muck, 62 How. Pr. 69.

[3] Leach's Club Cases, 45; Karcher v. Sup. Lodge K. of H., 137 Mass. 368, 372; People ex rel. Corrigan v. Young Men's Father Mathew Ben. Soc., 65 Barb. 357; Lambert v. Addison, 46 L. T. 20; Osceola Tribe v. Schmidt, 57 Md. 98; Burt v. Grand Lodge F. & A. M., 44 Mich. 208; Robinson v. Yates City Lodge, 96 Ill. 598, 599; Anacosta Tribe v. Murbach, 13 Md. 91; s. c. 71 Am. Dec. 625. An expulsion may be had under an amendment to the constitution or by-laws. Poulting v. Bachman, 31 Hun, 49; Austin v. Searing, 69 Am. Dec. 674, note.

[4] Austin v. Searing, 16 N. Y. 112; s. c. 69 Am. Dec. 665, and note; 673; Leech v. Harris, 2 Brewst. 571; White v. Brownell, 2 Daly, 329; s. c. 4 Abb. Pr. (N. S.) 162. It was held that where enforcement of the order of expulsion

accused will be jealously guarded by the courts and will not be upheld unless it appear that he has been formally charged, has had reasonable notice of the accusation or notice according to the laws of the body and full opportunity to be heard in defence.[1]

While, as before stated, committees may, under certain circumstances, be empowered to effect expulsion, the exercise of the power by them will be closely scrutinized, and should be free from malice or undue haste.[2] The general rules governing the service of

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involved the commission of an assault and battery upon the member he could not be presumed to have assented thereto. State v. Williams, 75 N. C. 134.

[1] Knights of Honor Supreme Lodge v. Johnson, 76 Ind. 110; Labouchere v. Wharncliffe, 13 Ch. D. 346; Delacy v. Neuse River Nav. Co., 1 Hawks (N. C.) 274; Innes v. Wylie, 1 Car. & K. 257; Wachtel v. Noah Widows' & O. Soc., 84 N. Y. 28, 31; Southern Plank R. Co. v. Hixon, 5 Ind. 165; Niblack on Mutual Ben. Soc., sec. 65; Fitz v. Muck, 62 How. Pr. 69, 74; Downing v. St. Columbia's, etc., Soc., 10 Daly, 262. In Hutchinson v. Lawrence, 67 How. Pr. 47, the court said:—"Again, while these proceedings are not to be governed by the strict rules which apply to actions at law or suits in equity, or even, perhaps, by the rules which obtain in regard to arbitration, there is, I think, a strong analogy between the principles which govern in arbitrations and those which relate to proceedings of this character." In Murdock v. Philips' Academy, 12 Pick. (Mass.) 244, the court held the proceeding to be judicial in its nature and stated somewhat in detail the essentials of valid expulsion proceedings. 1. A monition or citation to the accused to appear; 2. A charge given him to which he is to answer; 3. A competent time assigned for proofs and answers; 4—Liberty of counsel to defend his cause and to except the proofs and witnesses; 5—A solemn sentence after hearing proofs and answers. Though a formal complaint is usually necessary, this may be dispensed with in the laws of the society. Bissett v. Daniel, 10 Harr. 493 (case of a numerous copartnership). The constitution of the New York Stock Exchange provides for suspension of insolvent members, and that within a year from the time of suspension such members may apply for readmission on showing a settlement with their creditors; also that members guilty of obvious fraud, of which the governing committee shall be the judges, shall on vote of two-thirds of the members of said committee present be expelled. Plaintiff was suspended for insolvency, and charged with obvious fraud. He asked for and was granted an adjournment of the hearing, examined the testimony taken, appeared, and was heard and interrogated, and given a full opportunity for self-defence, and was adjudged guilty by a two-thirds vote, and expelled. He did not settle with his creditors within a year, nor apply for readmission, nor did he object to any of the proceedings. It was held that the court would not declare his suspension null and void. Kuehnemundt v. Smith, 2 N. Y. S. 625; 17 N. Y. S. Rep. 757.

[2] In Fisher v. Keene, 11 Ch. D. 353; 49 L. T. Ch. 11, the liability of such

notices apply in such cases. Notice may be waived by the member's appearance, and entering upon his defence or pleading guilty to the charge.[1] Unless the constitution or by-laws provide a different manner of giving notice, it must be personal.[2] Where the proposition to expel did not obtain the two-thirds vote required to pass it, it was held such failure amounted

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committees to abuse their power is thus stated by the chancellor:—"One must recollect, too, that the meetings of clubs are not always fair for another reason quite independently of any personal impropriety of conduct on the part of the members. . . . Some may say, 'Well, so-and-so is a man we ought to get rid of, and I shall put in a black ball;' another may say, 'Oh, we must support the committee; they have acted to the best of their judgment. They are all honorable men, men in whom we have the greatest confidence. If we do not support them, they will resign, and it will break up the club; I shall put in a black ball.' It is not like an appeal to a judicial tribunal, or even to a *quasi*-judicial tribunal. As I said before, it behooves a committee, who are a judicial or *quasi*-judicial tribunal, to be very careful before they expose one of their fellow members to such an ordeal. A committee ought not, as I understand it, according to the ordinary rules by which justice should be administered by committees of clubs, or by any other body of persons who decide upon the conduct of others, to blast a man's reputation forever—perhaps to ruin his prospects for life—without giving him an opportunity of either defending or palliating his conduct. In my opinion upon this ground also, the committee have not acted fairly or properly. I have no doubt they acted according to the best of their judgment, and with the utmost desire to do what was right, but I think that they have made a mistake, and that the right course is to grant an injunction, so that they may have an opportunity of re-considering this matter in a fair and impartial spirit." See also Labouchere v. Wharncliffe, 13 Ch. D. 346; Leach's Club Cases, 38.

[1] Moxey's Appeal (Pa.). 9 Week. N. Cas. 441; Sperry's Appeal, 116 Pa. 391; 8 Cent. Rep. 215; 9 Atl. Rep. 478; Commonwealth v. Penn. Ben. Soc., 2 Serg. & R. 141; Burton v. St. George's Soc., 28 Mich. 261.

[2] Wachtel v. Noah Widows' & O. Soc., 84 N. Y. 28, 31; Birmingham, etc., R. Co. v. Locke, 1 Q. B. 256; Graham v. Van Dieman's Land Co., 1 Hurl. & N. 541; Lewey's Island R. Co. v. Bolton, 48 Me. 451; s. c. 77 Am. Dec. 236; Schenectady, etc., Pl. Road Co. v. Thatcher, 11 N. Y. 102; Lexington, etc., R. Co. v. Chandler, 13 Met. 311; South Staffordshire Ry. Co. v. Burnside, 5 Ex. 129; Miss. etc., R. Co. v. Gaster, 20 Ark. 455; Cockerell v. C. Van Dieman's Land Co., 26 L. J. C. P. 203; Knight's Case, 2 Ch. 321. The trial resulting in the expulsion of a member having been conducted in due form and in good faith by the club, the courts will not inquire into his guilt. Com. v. Union League of Phila., 135 Pa. St. 301; 19 A. 1030; 26 W. N. C. 142. The by-laws of an incorporated musical society provided that the directors should investigate all charges against members, that any member bringing charges against another should appear personally to prove them, and that a copy of the charges must be served upon the accused. A member who had been charged with improper con-

to an acquittal upon the charges. It is doubtful if a member could, in such case, be subsequently expelled upon the same charges.[1] He certainly cannot without a rehearing upon new notice. Where the charter provided for expulsion after a hearing in such manner as the by-laws may provide, and a by-law provided for expulsion on the charges after a hearing on charges, "a copy of which shall be served on the member as charged," it was held that a notice served on a member to show cause why he "should not be expelled for violation of art. 12, sec. 1, of the by-law to wit:—for disobedience of the order of the board of directors on the 9th of March, 1886," was not such a service of a copy of the charges as to be a sufficient compliance with the statute.[2]

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duct appeared before the directors without being served with a copy of the charges, and denied the jurisdiction of the directors because the accuser was not present. It was held that an order of expulsion, entered on such charges during his absence, was void, the want of service not having been waived. People v. Musical Mut. Protective Union, 23 N. E. 129; 118 N. Y. 101.

Where the articles of a benevolent society provide that "any member who shall refuse or neglect to pay all fines, dues, or contributions quarterly, and who, having been notified by the financial secretary of his indebtedness, shall still neglect or refuse, for sixty days after receiving said notice, to cancel his indebtedness, shall be dropped from the roll of membership," it has no right to drop a delinquent member from the rolls unless he has received notice of his delinquency. People v. Theatrical Mechanical Ass'n, 8 N. Y. S. 675; 55 Hun, 608; holding also the evidence that delinquent was absent at the time the notice was mailed to his residence rebuts the presumption of its receipt by him which would ordinarily arise from the mailing of a notice to his place of residence. The constitution of a club gave power to the board of governors to censure, suspend, or expel members for misconduct, but provided that no such penalty should be enforced until after ten days' notice in writing had been given to the member. It was held that, in the absence of any agreement or provision to the contrary, personal notice was required, and notice sent by mail, which in due course, would have been delivered at the member's address ten days previous to the proposed action, but which was not received by him personally until nine days previous to then, was insufficient. People v. Hoboken Turtle Club, 14 N. Y. S. 76.

1 Com. v. Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 473.

2 People v. Musical Mut. Protective Union, 47 Hun, 273, holding also that an appearance at the time and place mentioned in the notice to deny the right of the directors to carry on the proceedings, and a refusal to answer the charges, are not a waiver of a right to have had a copy of the charges served previously.

Where the proceeding was for any cause a nullity, it does not stand in the way of a subsequent expulsion upon due notice. It may be disregarded or the party may be restored to membership and again regularly tried and expelled.[1]

§ 529. **Conduct of the trial.**—The committee or other body charged with the duty and vested with the power of expulsion must act at a regular or at a special meeting called upon proper notice;[2] and it is necessary that a quorum should be present.[3]

The offences charged against the member must be established upon formal investigation and upon evidence, and must not rest upon inference alone.[4] Although a member, against whom proceedings for expulsion have been instituted upon formal charges, fails to appear after due notice, the evidence in support of the accusation should be required.[5] But a committee need not

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Remedies for improper expulsion and suspension from societies and fraternities discussed under the following heads:—Preliminary; Relief in the Society; Review by Court; Distinctions between Unincorporated and Incorporated Societies; Reinstatement; Legal Remedies; Action at Law; *Mandamus;* Injunction; and English and American decisions on the subject collected by E. McQuillin, 20 Cent. Law J. 327.

[1] Hurst v. N. Y. Produce Exchange, 100 N. Y. 605; 3 N. E. 42; Mem. S. C. in full, 1 Cent. Rep. 206.

[2] Payn v. Rochester Mut. Relief Soc., 17 Abb. N. C. 53.

[3] Med. & Surg. Soc. v. Weatherly, 75 Ala. 248. As to what constitutes a quorum of a committee charged with the duty of expulsion, see Loubat v. Leroy, 40 Hun, 546; 15 Abb. N. C. 1. In this case it was provided by the constitution of a club that a member might be expelled by a two-thirds vote of the governing committee and that a majority of such committee should constitute a quorum. It was held that a two-thirds vote of a quorum of the committee as it existed at the time of the vote was sufficient although vacancies existed.

[4] Schweiger v. Voightlander Benev. Ass'n, 13 Phila. 113.

[5] People ex rel. Corrigan v. Young Men's Father Matthew Ben. Soc., 65 Barb. 357; Labouchere v. Wharncliffe, 13 Ch. D. 346. In the last case the Master of the Rolls said:—"The committee are not to form an opinion without inquiry. They are not to take up a newspaper and see that A. B. has written a letter which they may consider scandalous, or that C. D. has been brought up in a police court for drunkenness." For it might well happen that the wrong man was charged, because it was well known that men had given the name of a

take evidence in legal form, or confine themselves to such evidence only as would be admissible in a court of justice. They may resort to any proper and fruitful source of information, and may take notice of matters of common notoriety and general repute. It is only necessary that they act in good faith, and are convinced as reasonable men of the truth of the charges.[1]

§ 530. Equitable jurisdiction in cases of simple expulsion.—Seldom will courts interfere with the exercise of the right of expulsion, from clubs and associations, where no property rights are thereby affected. The reason they will not, is based upon the assumption that the associates are themselves the best judges of the fitness and worth of individuals to continue the relationship which, in many cases, could not be fully investigated and unerringly determined before the consummation of the contract of membership.[2] The same rules, so

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friend or an enemy. Inquiry meant inquiry into the facts, and also into whatever excuse or reason might be given by the member whose conduct is to be inquired into. They should have given notice, if they could, to the member that his conduct was about to be inquired into, and should have given him an opportunity of stating his case to them."

[1] Leach's Club Cases, 45; Labouchere v. Wharncliffe, 13 Ch. D. 346.

[2] Upon this question the language of the court in Rigby v. Connol, 14 Ch. D. 482; 49 L. J. Ch. 328, is clear, luminous and instructive. The learned justice said:—"I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any court of justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses or at any place where there is a possibility of their meeting each other, but if the association has no property, and takes no subscription from its members, I cannot imagine that any court of justice could interfere with such an association, if some of the members declined to associate with some of the others."

far as applicable, govern questions of expulsion, whether the society be incorporated or voluntary.[1] But this policy of non-interference relates to the grounds of expulsion and not to the manner. As has been stated, the proceedings must be fairly conducted, according to the rules of the organization, and must be free from malice and bad faith;[2] otherwise a court of equity will enjoin the threatened expulsion, or, if already consummated, a writ of *mandamus* will lie to restore the member to his rights.[3]

Some of the expressions of the early English cases on this subject require qualification. They seem to lose sight of all distinctions between purely social and other objects for which associations are formed. True, as said in Rigby v. Connol[4] if a dozen gentlemen agree to meet occasionally in a casual way, and eleven of them come to the conclusion to no longer associate with the twelfth, there is no law to compel them to do so, however capricious and unreasonable their reasons. But where a constitution and by-laws have been formally adopted, and permanency has been given to an institution organized for various objects, it is clear that the contract of membership includes rights which, though they may not be of pecuniary value, are yet substantial and valuable, and cannot be taken away recklessly, and in violation of the plain rules of justice. While the motives of individual members of such bodies or of committees for voting to expel will not be in-

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1 Otto v. Journeyman Tailors' P. & B. U., 75 Cal. 308; 17 P. 217; s. c. 7 Am. St. Rep. 156, 158; Sale v. First Regular Baptist Church, 62 Ia. 26; 17 N. 143; s. c. 49 Am. Rep. 136; Rigby v. Connol, 14 Ch. D. 482; s. c. 49 L. J. Ch. 328; Burke v. Roper, 79 Ala. 138.

2 Supra, §§ 527, 528.

3 Infra, § 648. See also Stark B'k v. U. S. Pottery Co., 34 Vt. 144; Dedham Inst., etc., v. Slack, 6 Cush. 408; Hiss v. Bartlett, 6 Am. Dec. 776; Austin v. Searing, 69 Am. Dec. 665, n.

4 14 Ch. D. 482; S. C. 49 L. J. Ch. 328.

quired into, yet where the proceeding on its face shows gross injustice or a violation of the rules, a ground is furnished for equitable interference.[1]

§ 531. **Same, where property interests are affected.**—There is an important distinction between cases of simple expulsion from the enjoyment of the personal privileges of membership and those where such expulsion has the effect of forfeiting property interests. In the latter class of cases, courts will much more closely scrutinize the proceedings and more readily interfere to protect those interests and redress wrongs thereto.[2]

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[1] Otto v. Journeyman Tailors' P. & B. U., 75 Cal. 308; 17 P. 217; s. c. 7 Am. St. Rep. 156, 159, citing Hirsch on Fraternal Societies, 56; Dawkins v. Antrobus, 44 L. T. Rep. 557; s. c. L. R. 17 Ch. D. 615; Lambert v. Addison, 46 L. T. 20. In Otto v. Journeyman Tailors', etc., Union, supra, the court say:—"We are referred to the provision of appellant's constitution, which provides that 'any member having a grievance shall have the right to lay his case before the central body, who shall take action thereon, and whose decision shall be final.' No doubt, when an action is properly taken in the manner indicated, it is final and the courts will not interfere; but when, under the guise of remedying the grievance of a member, the central body acts in bad faith and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may however, to that extent, be the subject of review." In Gardner v. Freemantle, 24 L. T. 81, Lord ROMILY said:—"In some cases this court interfered with the exercise of that paramount authority, but only where there is a moral culpability, or if the decision is arrived at from fraud, personal hostility or bias. But in cases of this description all that this court requires is to know that the persons who were summoned really exercised their judgment honestly. The court will not consider whether they did rightfully or wrongfully."

[2] People v. Bd. of Trade, 80 Ill. 134; Hopkinson v. Marquis of Exeter, 37 L. J. Ch. 173; s. c. 5 L. R. Eq. 63; Rigby v. Connol, 14 L. R. Ch. D. 482; State v. Odd Fellows, etc., 8 Mo. App. 148; Dawkins v. Antrobus, 17 L. R. Ch. D. 615; 44 L. T. 557; Pulford v. Fire Dept., 31 Mich. 458; Olery v. Brown, 51 How. Pr. 92; Thompson v. Soc. Tammany, 17 Hun, 305; Milroy v. K. of H. Sup. Lodge, 28 Mo. App. 463; Otto v. Jour. Tailors', etc., Union, 75 Cal. 308; 17 Pac. Rep. 217; Bauer v. Sampson Lodge, 102 Ind. 262; 1 N. E. 571; White v. Brownell, 2 Daly, 329; Austin v. Searing, 16 N. Y. 112; Supreme Council v. Garrigus, 104 Ind. 133; 3 N. E. 818; Schmidt v. A. Lincoln Lodge, 84 Ky. 490; 2 S. W. 156; Lewis v. Wilson, 2 N. Y. S. 806. A member of a benevolent mutual society cannot be expelled without notice, and in his absence, although the rules of the society do not require notice. Sup. Lodge A. O. U. W. v. Zuhlke, 30 Ill. App. 98; aff'd, 21 N. E. 789; 129 Ill. 298; The fact that a motion was made to suspend a member of a mutual benefit association, but the presiding

Important questions sometimes arise on contracts in mutual benefit societies which contain the right to participate in various ways in sick and death benefit and endowment funds. Such societies are not only social organizations, but are mutual insurance companies. If the courts could deal with them in their character of mere social organizations, the principles set forth in the last preceding section would be applicable to them. But the members to whom certificates are issued by such societies acquire property rights in the society of an important character; and in dealing with these rights, it is highly essential that the courts should confine themselves strictly to the terms of the contract which the members have made among themselves.[1] "It would be a very dangerous doctrine to apply to societies which, in addition to the character of social clubs, possess also the character of life insurance companies, and which undertake to insure the lives of their members for the benefit of their families, paying them a large sum in the event of the death of the member, the rule that they can expel their members, and thereby deprive their families of the benefit of this insurance, it may be, after the member has paid assessments for many years, and when, by reason of age or bad health, he has passed into such a state that new insurance upon his life cannot be procured, for causes not named in their constating instruments, or in the public statutes, or such as the members of

officer refused to put the motion to a vote on the ground that it was contrary to the rules, does not constitute such a suspension as will defeat the right of recovery of the beneficiary in his certificate after his death. Grand Lodge A. O. U. W. v. Brand (Neb.), 46 N. W. 95. A member of a mutual benefit association, who is expelled or suspended, without notice or trial, has a cause of action against the association. Ludowiski v. Polish Roman Catholic St. Stanislaus Kostka Benevolent Ssciety, 29 Mo. App. 337.

[1] Mulroy v. Knights of Honor, 28 Mo. App. 463; Grand Lodge v. Elsner, 26 Mo. App. 108; Coleman v. Knights of Honor, 18 Mo. App. 189.

the subordinate lodge may, in the excitement of the hour, deem a good ground of expulsion. We hold in this case, as we have held in other cases of this kind, that the rights of the beneficiary in such a certificate are strictly a matter of contract; that this contract is to be found in the terms of the certificate itself, in the statutes of the society, and, in case of a society incorporated under the laws of this state, in the statutes of this state relating to such societies."[1]

The principles indicated in the language just employed are entirely applicable to other cases involving contracts, conferring upon the holders pecuniary interests in corporate funds in addition to membership privileges.[2]

§ 532. Remedies inside association must be exhausted.— It is well settled that unless the association, or the tribunal within it, having jurisdiction of the matter, has acted in such total disregard of rules as to render the proceeding a nullity, or that the aggrieved party has had no notice of the proceeding, he must first exhaust the remedies for redress, if any, provided by the society itself,[3] unless property interests are involved. In the

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[1] Mulroy v. Knights of Honor, supra. per THOMPSON, J.; see article by same Judge and author March, and April number, Am. L. Rev. 1891.

[2] See Osceola Tribe v. Schmidt, 57 Md. 98; Woolsey v. Independent Order, etc., 61 Ia. 492; 16 N. E. 576; Sperry's Appeal, 116 Pa. St. 391; 9 A. 478; 8 Cent. Rep. 115; Grosvenor v. United Society, etc., 118 Mass. 78; Anacosta Tribe v. Murbach, 13 Md. 91; Dawkins v. Antrobus L. R., 17 Ch. D. 615; aff'd, 44 L. T. Rp. (N. S.) 557; White v. Brownell, 4 Abb. Pr. (N. S.) 162; Hopkinson v. Marquis of Exeter, L. R. 5 Eq. 63; Burton v. St. George's Soc., 28 Mich. 261; Farnsworth v. Storrs, 5 Cush. 412; Dolan v. Court of Good Samaritan, 128 Mass. 437; Karcher v. Supreme Lodge, 137 Mass. 368; Hutchinson v. Lawrence, 67 How. Pr. 38; Jones v. National, etc., Ass'n (Ky.), 2 S. W. Rep. 447; Loubat v. Leroy, 15 Abb. N. C. 1; Olery v. Brown, 51 How. Pr. 92; Lafond v. Deems, 8 Abb. N. C. 388; s. c. 81 N. Y. 507.

[3] Karcher v. Sup. Lodge, etc., 137 Mass. 368; Lafond v. Deems, 8 Abb. N. C. 388; s. c. 81 N. Y. 508; Poultney v. Bachmann, 31 Hun, 49; Dolan v. Court Good Samaritan, 128 Mass. 437; Chamberlain v. Lincoln, 129 Mass. 70; Gros-

latter case, courts will interfere for the purpose of protecting rights of members in all proper cases, whether the society be incorporated or not; and when they have acquired jurisdiction will follow and enforce as far as applicable the proper principles and remedies.[1]

The action of the association honestly taken according to its rules, on a question which it has authority to decide upon due notice, cannot be collaterally reviewed by the courts.[2] But if the action of the body be a usurpation, or without notice or authority, it cannot affect the legal rights or change the legal status of any one; and the obligation to appeal is not imposed when the judgment is void for want of jurisdiction.[3]

§ 533. **Presumption in favor of regularity.**—The same presumption in favor of the regularity of expulsion proceedings prevails as in the case of transactions of corporate bodies generally where there is no question as to jurisdiction.[4] It is otherwise where the expulsion involves the loss of property rights. In that case, courts will look into the whole question, untrammelled by presumptions and probabilities.[5] The whole matter

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venor v. United Soc., etc., 118 Mass. 78; White v. Brownell, 4 Abb. Pr. (N. S.) 162; s. c. 2 Daly, 329; Carlen v. Drury, 1 Ves. & B. 154; Harrington v. Workingmen's Ass'n, 70 Ga. 340; Lewis v. Wilson, 2 N. Y. S. 806; aff'd, 121 N. Y. 284; 24 N. E. 474; Burns v. Brick-Layers', etc., Ass'n, 10 N. Y. S. 916; *Res adjudicata* in church courts discussed, and American decisions bearing upon the subject collected by W. H. Burnett, 30 Cent. L. J. 73.

[1] Otto v. Jour. Tailors', etc., Union, 75 Cal. 308; 17 P. 217.

[2] Karcher v. Sup. Lodge, etc., 137 Mass. 368.

[3] Bacon, Ben. Soc. & L. Ins., sec. 107; Hall v. Sup. Lodge Knights of Honor, U. S. Circuit Ct. E. D. Ark., 24 Fed. Rep. 450; Mulroy v. Sup. Lodge Knights of Honor, 28 Mo. App. 463. "It may be likened to a judgment rendered by a court which has no jurisdiction of the subject-matter or the person. No appeal or writ of error is necessary to get rid of such a judgment; it is void in all courts and places." Hall v. Sup. Lodge, etc., supra.

[4] Bachman v. N. Y. Arbeiter, etc., 64 How. Pr. 442; Harmon v. Drether, 1 Speer Eq. 87; Shannon v. Frost, 3 B. Mon. 253; Burton v. St. George's Soc. 28 Mich. 261.

[5] People v. Fire Dept., 31 Mich. 458; People v. Medical Society, 32 N. Y. 187.

is well summarized as follows: "In seeking to obtain rights under the by-laws or rules of a society, the member must proceed as therein required, and generally exhaust the remedies established by the by-laws and rules before applying to the courts for relief. If no tribunal is established by the rules, he may at once resort to the courts. In the case, however, of property rights, it has been held that he may or may not leave the determination to the tribunals of the order; he may sue at once, or he may consent to an adjudication by the society, in which latter case he is bound as by an arbitration, provided no principles of natural justice have been violated by the tribunal, and the proceedings are regular."[1]

§ **534. Forfeiture and suspension of contract by its terms.**—The certificates of mutual benefit societies usually provide for payment by the holder of assessments at specified times; and further, that non-payment shall cause a suspension of membership privileges, and if such failure continues, a forfeiture of all rights of membership, including all claim against the society for benefits.

Such provisions are in the nature of penalties and are strictly construed.[2] The assessment must be made in strict conformity with all its laws, and there is no presumption in favor of the regularity or legality of the acts of the directors in making assessments, or other steps by which a member's rights are forfeited.[3] But no judicial determination either by a tribunal inside the association, or elsewhere, is necessary to effect a

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1 Bacon, Ben. Soc. & L. Ins., sec. 116.

2 Bates v. Detroit Mut. Ben. Ass'n, 51 Mich. 587; Underwood v. Ia. Legion of Honor, 66 Ia. 134; 23 N. W. 300; Passenger Conductors' Ass'n v. Birnbaum (Pa.), 10 Cent. Rep. 63; 11 Atl. 378.

3 Supra, § 531.

suspension or forfeiture of rights on account of non-payment of assessments, where the same is provided for in the contract or in the laws;[1] and a member may, by contract, dispense with notice.[2]

A simple provision, however, to the effect that for the non-payment or other default or act a member shall forfeit his contract, is not self-enforcing. There must be some action or proceeding on the part of the society. This rule is of general application.[3] The effect of a suspension is to deprive the member suspended of all rights and benefits, except to be reinstated upon taking the prescribed steps for that purpose.[4]

Suspension from mutual benefit societies usually results from the non-payment of dues and assessments. It is generally held that, if a member die while suspended, his beneficiary cannot recover the benefit from the society; and in one case this rule was applied so far as it affected a supreme lodge, although the subordinate lodge from which he had been suspended continued to treat him as a member after default.[5] After, by affirmative action by the society, a member has been suspended, and having notice of such action, he does not exercise the right of appeal secured by the laws of the organization, such action, if regular, is final, and cannot be assailed in an action on the certificate after the member's death.[6]

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[1] Borgraffe v. Knights of Honor, 32 Mo. App. 127.

[2] McDonald v. Ross-Lewin, 20 Hun, 87.

[3] See Med. & Surg. Soc. v. Wetherly, 75 Ala. 248; State v. Trinity Church, 45 N. J. Eq. 230; Scheu v. Grand Lodge, etc., Ind. Foresters, 17 F. 214; Olmstead v. Farmers' Mut. F. Ins. Co., 50 Mich. 200; Columbia Ins. Co. v. Buckley, 83 Pa. St. 293; Supple v. Ia. State Ins. Co., 58 Ia. 29; 11 N. 716.

[4] Knights of Honor Supreme Lodge v. Abbott, 82 Ind. 1; Borgraefe v. Knights of Honor, 22 Mo. App. 127; Manson v. Grand Lodge, 30 Minn. 509.

[5] Borgraefe v. Knights of Honor, 22 Mo. App. 127.

[6] Karcher v. Supreme Lodge K. of H., 137 Mass. 368; Chamberlain v. Lin-

Undoubtedly, members may so contract, or provisions of the laws may be such, that the mere non-payment within a specified time is a repudiation of the contract, and *ipso facto* effects a forfeiture of all rights under it.[1]

§ 535. By-laws imposing forfeiture require statutory sanction.—The common law disfavor of forfeitures extends to by-laws of associations providing forfeitures as penalties. These are of no force or effect unless their adoption be authorized by statute. "No such power is consistent with common law or ancient right, and it

coln, 129 Mass. 70; Mulroy v. Knights of Honor, 28 Mo. App. 463. Under a by-law of a benevolent association, providing for payment of benefits in case of sickness, etc., to "every member in good standing on the books," a member cannot be deprived of such benefits because in arrears for dues, where the amount of the dues in arrear is less than the benefits to which he was entitled when they became due. Brady v. Coachman's Benev. Ass'n, 14 N. Y. S. 272.

[1] Ill. Masons' Benev. Soc. v. Baldwin, 86 Ill. 479; Am. Mut. Aid Soc. v. Kilburn, 7 Ky. L. Rep. 750; Yoe v. B. C. Howard M. B. Ass'n, 63 Md. 86; Rood v. Railway Passengers', etc., Ass'n, 31 Fed. Rep. 62; Blanchard v. Atlantic Mut. F. Ins. Co., 33 N. H. 9; Madeira v. Merchants' Exch., etc., Soc., 16 F. 749; 5 McC. 258; McDonald v. Ross-Lewin, 29 Hun. 87. In Borgraefe v. Knights of Honor, 22 Mo. App. 127, 142, the court, per THOMPSON, J., this principle is more fully discussed as follows:—"It was argued in behalf of the plaintiff, at the bar, that there was no forfeiture in this case, because the declaration of a forfeiture is a judicial act, and neither Ada Lodge, nor any other judicatory having the power to declare a forfeiture, had so adjudged. This contention has no foundation, in view of the fact that under provisions of sec. 3, of law 2, above quoted, it is not necessary that the lodge or any other judicatory of the order should adjudge a forfeiture against a delinquent member for non-payment of an assessment for a death benefit, but that, on the contrary, the suspension attaches by operation of law. There is, in view of this provision, a plain distinction between this case and cases which have arisen under the constating instruments of mutual insurance companies, and other benevolent orders of this character, where the governing statute recites that for the non-payment of dues, or other named delinquency, the member may be suspended by the lodge or other judicatory. Here the member is not suspended, until the lodge or other designated judicatory exercises the power of suspension. The reason is that, whatever the lodge or the order may have against the member for an infraction of its rules, must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts. But where, as in this case, the suspension attaches by an operation upon an event named, and the member dies before the suspension has been set aside, in conformity with the rules of the order, there can be no recovery upon his benefit certificate."

cannot be obtained from anything but the sovereignty. The only means for the enforcement of corporate charges and penalties is by action. Summary means and methods unknown to the common law must be authorized by express authority. And it would not be reasonable to enforce a pecuniary obligation or penalty by means disproportionate to its importance."[1]

§ **536. Reinstatement.**—After final expulsion or forfeiture there can be no such thing as a reinstatement. If the party still desires membership he can only obtain it as any other outsider. But a suspension only has a similar effect to a *nisi* decree or an interlocutory order of a court. The suspended member is only required to do things prescribed as a condition to reinstatement. No affirmative action is required by the society in recognition of the renewed relation as a general rule. Thus it was held that where a suspended member might be restored upon payment of arrearages, he was not required to tender the arrearages to a meeting of the lodge; that payment to the proper financial officer was sufficient; and that no assent or action on the part of the lodge was necessary to his complete restoration.[2] Sometimes, however, a member can only be suspended by action of the society or a managing board thereof.[3] In other societies it is expressly provided that applications for reinstatement upon lapsed and forfeited certificates must

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[1] People v. Fire Dept., 31 Mich. 458, 465, per CAMPBELL, J. See also, Wescott v. Minnesota Mining Co., 23 Mich. 145; Matter of Long Island R. Co., 19 Wend. (N. Y.) 37.

[2] Manson v. Grand Lodge A. O. U. W., 30 Minn. 509; 16 N. W. 395. Under a by-law of a benevolent society providing that any subordinate lodge in arrears should stand suspended, and that no death benefit should be paid during the suspension, it was held that the by-law was not to be construed as cutting off the right to receive the benefit except while the suspension continued. Knights of Honor v. Abbott, 82 Ind. 1.

[3] See Olmstead v. Mut. F. Ins. Co., 50 Mich. 200; 15 N. W. 82.

be passed upon by the body or a committee, and that it can only be granted upon a satisfactory excuse being shown. In such cases, the restoration to rights is discretionary with the society, or its designated agents, and the decision is judicial in its nature. But such judicial function must not be abused. Courts will not be concluded by an arbitrary decision upon the question, and will examine into the validity of the excuses offered for non-payment.[1]

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[1] Dennis v. Mass. Ben. Ass'n, 47 Hun, 338. In this case the defendant association had issued to one Dennis a certificate of membership to which was annexed among other rules and conditions one providing that the member should, within thirty days after the mailing of a notice of assessment to pay the same, and that if the assessment should not be received by the company within the time the contract should lapse, and be void; but that "for valid reasons to the officers of the association (such as a failure to receive notice of an assessment) he may be reinstated upon paying assessment arrearages." After receiving notice of an assessment, but before the expiration of the thirty days, the member was stricken with apoplexy and remained unconscious until several days after the expiration of the thirty days, when he died. The beneficiary then tendered the assessments due and offered these facts as an excuse for the member's default; but the officers declined to receive them or to acknowledge the sufficiency of the excuse offered. An action having been brought by the beneficiary for the benefit, the trial court had directed a verdict for the defendant; but the appellate court held this to be an erroneous ruling, and that the question whether the facts showed a "valid reason" within the meaning of the contract should have been submitted to the jury. The court reasoned thus: "What right would the member have had if he had recovered his reason on the day he died. In the first place, the words were intended to be operative. The defendant obtained the premiums on agreement to pay assessments upon them. He assured the members that, if a valid reason was furnished for the default, it should not be exclusive. The use of the restrictions as to the validity of the excuse to the officers of the company did not mean to make them sole arbiters of the validity of the reason. The company illustrate by citing an instance of a good excuse by the term 'such as a failure to receive notice of an assessment.' If an assessment notice had not been received without the fault of the member, can it be doubted but that the officers were bound to acknowledge it and reinstate the member upon payment of arrearages? The company say that is a good excuse, and impliedly say that other good reasons for the default must be acknowledged also. The court of appeals have decided that a discretion given to trustees is not personal. Is the reason assigned a valid reason under the contract? There can be no doubt of this fact. The assessed had thirty days, and before he paid the assessment he was rendered powerless by sudden calamity—his intent to pay is manifest by numerous previous payments. This was the construction put on the rule by the defendant. They again, after he was unconscious, notified the member of the forfeiture for non-payment and that the contract might be

Considerable conflict of views on the subjects of suspension, forfeiture, and reinstatement will be observed in the authorities cited which in some cases cannot be reconciled, while in others the conflicting views result from differences in the statutory provisions and their construction.

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renewed if in good health. This condition, in respect to good health, is not in the rule, and the officers had no right to add it in the rule. If a valid reason existed for the default the member must be reinstated, because of the valid reason for the default, and not because he had a valid reason and was in good health. The rule, as created by the company in this respect, would exclude cases where it was vital that they should be included in the contract. If the good reason was rejected in cases of ill health or death the insured would lose a real value in the contract. If members become sick or die the policy is at an end, no matter how completely the default may be excused. This would make a very unfair contract, not within the words of the rule, and one whieh the company would be unwilling to print in its rules." To same effect are Hull v. Hull, 24 N. Y. 647; The Duplex Boiler Co. v. Garden, 101 Id. 387; 4 N. E. 749; Van Houten v. Pine, 38 N. J. Eq. 72; Oats v. Supreme Court of Foresters, 4 Ont. Rep. 535.